TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1[redacted] 1917

No. [redacted]235

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

EDWARD M. COMYNS AND CARLOS L. BYRON.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

FILED AUGUST 10, 1917.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 613.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR.

vs.

EDWARD M. COMYNS AND CARLOS L. BYRON.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

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1 *Names and addresses of attorneys.*

Attorneys for plaintiff in error: Clay Allen, Esquire, United States attorney, Federal Building, Seattle, Washington; George P. Fishburne, Esquire, Assistant United States attorney, Federal Building, Tacoma, Washington.

Attorney for defendants in error: P. V. Davis, Esquire, 531 Lyon Building, Seattle, Washington.

2 United States District Court, Western District of Washington, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
v.
EDWARD M. COMYNS AND CARLOS L. BYRON, DEFENDANTS. } No. 2217.

Præcipe for record and stipulation.

To the clerk of the above-entitled court:

You will please prepare transcript of the record in the above-entitled cause, to be heard on writ of error to the Supreme Court of the United States, which said transcript of record in said cause shall contain true copies of the following documents and papers filed in said above cause, to wit:

1. Indictment.
2. First demurrer.
3. Order overruling demurrer.
4. Bill of particulars.
5. Amended bill of particulars.
6. Second demurrer.
7. Motion to strike from bill of particulars.
8. Memorandum decision.
9. Judgment sustaining demurrer.
10. Bill of exceptions.
11. Assignments of error.
12. Petition for writ of error.

3 13. Order allowing writ of error.

14. Citation.
15. Writ of error.
16. Præcipe for record and stipulation attached thereto.
17. All proofs of service, acknowledgments of service, all endorsements of any kind appearing on any of the papers named in this præcipe, and also all file marks.

Said record to be duly authenticated and certified under the seal of court as in such cases provided under the statutes and rules of court.

Dated at Tacoma, Washington, this 1 day of August, A. D. 1917.

CLAY ALLEN,
United States Attorney for Plaintiff in Error.
GEORGE P. FISHBURNE,
Assistant United States Attorney for Plaintiff in Error.

It is hereby stipulated by and between the parties hereto, through their respective attorneys, that the papers set out in foregoing praecipe, together with the original citation and the original writ of error, comprise all the papers, documents, and other proceedings which are necessary to the hearing of the said cause upon writ of error in the United States Supreme Court, and that only such papers need be included in the record of said court.

CLAY ALLEN,
United States Attorney for Plaintiff in Error.

4 GEORGE P. FISHBURNE,
Assistant United States Attorney for Plaintiff in Error.
P. V. DAVIS,
Attorneys for Defendants in Error.

Received a copy of the within præcipe & stipulation this 1st day of Aug., 1917.

P. V. DAVIS,
Attorney for Defendants.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Aug. 1, 1917. Frank L. Crosby, clerk. By F. M. Harshberger, deputy.

5 United States District Court, Western District of Washington, Southern Division.

February term, 1917.

UNITED STATES OF AMERICA, PLAINTIFF,
v.
EDWARD M. COMYNS AND CARLOS L. BYRON, DEFENDANTS. } No. 2217.

Indictment.

The United States of America, Western District of Washington, Southern Division, ss:

The grand jurors of the United States of America, duly selected, impaneled, sworn, and charged to inquire within and for the Southern Division of the Western District of Washington, upon their oaths present:

Count I.

That one Edward M. Comyns and one Carlos L. Byron, and each of them, on the tenth day of December, A. D. one thousand nine hundred and fourteen, at Chehalis, in the county of Lewis, within the Southern Division of the Western District of Washington and within the jurisdiction of this court, having theretofore devised and intended to devise a scheme and artifice to defraud one Carl S.

Baker, Charles H. Parent, Oscar H. Mack, Harry N. McDonald, Leo S. McDonald, A. R. McDonald, Francis M. McPherson, William F. Ulrich, Persis G. Ulrich, and divers other persons to the grand jurors unknown; that is to say, to obtain from them and each of them their moneys and property by means of divers false and fraudulent pretenses and representations, and to induce the persons intended to be defrauded to give to the said defendants, and to each of them, such moneys and property, with the intent on the part
6 of the said defendants, and each of them, to convert the same to their own use, and to the use of each of them, which said scheme and artifice so devised and intended to be devised by the defendants, and each of them, was as follows:

That Edward M. Comyns and Carlos L. Byron, and each of them, should represent that said Edward M. Comyns was a lawyer admitted to practice before the United States Land Office, and that said Carlos L. Byron was a locator and that they could locate said parties and secure for them the preference right to purchase from the United States of America under the timber and stone act of June 3, 1878, certain land within the Western District of Washington, for the sum of two and 50/100 dollars ($2.50) per acre, by filing an application to purchase under said act, and that the said property was worth more than that sum; and that they would agree with said parties to be defrauded that they would charge from one hundred dollars to one thousand dollars a piece as a fee for locating said parties and securing for them title to said land above mentioned, and that a part of said fee hereinafter called the initial fee should be paid at the time of their making the agreement and the balance of said fee should be paid at the time said parties to be defrauded secured their title to said land, and that if said parties to be defrauded failed to get title to said land, then the said defendants and each of them would refund to said parties to be defrauded the amount of the fee already so paid to said defendants; whereas as a matter of fact, as the defendants and each of them well know, the said defendants could not locate said parties and could not secure for them the preference right to purchase from the United States of America the land above mentioned for the sum of two and 50/100 dollars ($2.50) per acre by filing said application; and the agreement, as to the land, to be performed in consideration of the payment of said fee was for the purpose of securing the payment of said initial fee and for the purpose of delaying the said parties to be defrauded from demanding the repayment of said
7 initial fee and for the purpose of preventing said parties to be defrauded from discovering the fact that they had been defrauded and disclosing said fact to others, and said defendants and each of them intended to appropriate to their own use and the use of each of said defendants said initial fee, and did not intend to refund said initial fee or any part thereof if said parties to be defrauded failed to get title to said land in accordance with said agreement.

And the said defendants, Edward M. Comyns and Carlos L. Byron, and each of them, on or about the tenth day of December, A. D. one thousand nine hundred and fourteen, at Chehalis, Washington, in the southern division of the Western District of Washington and within the jurisdiction of this court, for the purpose of executing said scheme and artifice and attempting so to do, wilfully, knowingly, unlawfully, and feloniously caused to be placed in the post office of the United States at Chehalis, Washington, and an authorized depository for mail matter at said Chehalis, to be sent and delivered by the post-office establishment of the United States a letter addressed to Hon. Glenn N. Ranck, Reg., U. S. Land Office, Vancouver, Wash., enclosing a timber and stone application and a United States post office money order for ten dollars, which said letter and timber and stone application were in the following language, to wit:

"LAW OFFICE OF W. A. WESTOVER,
"*Chehalis, Washington, Dec. 10, 1914.*

"Hon. GLENN N. RANCH,
"*Reg., U. S. Land Office, Vancouver, Wash.*

"DEAR SIR: I enclose timber claim application of Francis
8 M. McPherson and money order for $10.00 in payment of fees.

"Yours, truly,

"W. A. WESTOVER."

9 4—522.—Departmental regulations approved by the Secretary of the Interior, November 30, 1908. Department of the Interior. Timber or stone entry. U. S. Land Office, Vancouver, Wash., Dec. 10, 1914, no. ———. Receipt No. ———.

Application and sworn statement.

[To be made in duplicate.]

I, Francis M. McPherson (male), hereby make application to purchase the SE¼ section 12, township 13 N., range 6 E., Willamette meridian, containing 160 acres, within the Vancouver, Wash., land district, in the State of Washington, and the timber thereon, at such value as may be fixed by appraisement, made under authority of the Secretary of the Interior, under the act of June 3, 1878, commonly known as the "timber and stone law," and acts amendatory thereof, and in support of this application I do solemnly swear that I am a native born citizen of the United States, of the age of 42 years, and by occupation a merchant; that I from information and belief state that said land is unfit for cultivation and is valuable chiefly for its timber; and that to my best knowledge and belief, based upon said information, the land is worth nothing *dollars*, and the timber thereon, which I estimate to be 1,000,000 feet, board measure, is worth four hundred dollars, making a total value

for the land and timber of four hundred dollars and no more; that the land is uninhabited: that it contains no mining or other improvements, nor, as I verily believe, any valuable deposit of gold, silver, cinnabar, copper, coal, or other minerals, salt springs, or deposits of salt; that I have made no other application under said acts; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself; that since August 30, 1890, I have not entered and acquired title to, nor am I now claiming, under an entry made under any of the nonmineral public-land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres; that I am not a member of any association, or a stockholder in any corporation which has filed an application and sworn statement under said act; and that my post office address is Index, Washington, at which place any notice affecting my rights under this application may be sent.

I request that notice be furnished me for publication in the ---------- newspaper published

(The newspaper must be one of general circulation, published nearest the land.)

at ----------

FRANCIS M. MCPHERSON.

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See sec. 5392, R. S., below.)

In addition thereto, the money that may be paid for the land is forfeited, and all conveyances of the land, or of any right, title, or claim thereto, are absolutely null and void as against the United States.

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant has been satisfactorily indentified before me by C. L. Byron, 322 White Bldg., Seattle, Wash.; that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described, and that said affidavit was duly subscribed and sworn to before me at my office, in Chehalis, Lewis County, Washington, within the Vancouver, Washington, land district, this 10th day of December, 1914.

W. A. WESTOVER,
U. S. Com. for Western Dist. of Washington,
Residing at Chehalis, Wash.

(W. A. Westover, United States Commissioner, Western Dist. of Washington.)

Revised Statutes of the United States.

Title LXX.—Crimes.—Chap. 4.

SEC. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See sec. 1750.)

NOTE.—In addition to the above penalty, every person who knowingly or willfully in anywise procures the making or presentation of any false or fraudulent affidavit pertaining to any matter within the jurisdiction of the Secretary of the Interior may be punished by fine or imprisonment.

11 4—522.—Departmental regulations approved by the Secretary of the Interior November 30, 1908. Department of the Interior. Timber or stone entry. U. S. Land Office, Vancouver, Wash., Dec. 10, 1914, No. ———, Receipt No. ———.

Application and sworn statement.

[To be made in duplicate.]

I, Francis M. McPherson (male), hereby make application to purchase the SE¼, section 12, township 13 N., range 6 E., Willamette meridian, containing 160 acres, within the Vancouver, Wash., land district, in the State of Washington, and the timber thereon, at such value as may be fixed by appraisement, made under authority of the Secretary of the Interior, under the act of June 3, 1878, commonly known as the "timber and stone law," and acts amendatory thereof, and in support of this application I do solemnly swear that I am a native-born citizen of the United States, of the age of 42 years, and by occupation a merchant; that I from information and belief state that said land is unfit for cultivation and is valuable chiefly for its timber; and that to my best knowledge and belief, based upon said information, the land is worth nothing dollars, and the timber thereon, which I estimate to be 1,000,000 feet, board measure, is worth four hundred dollars, making a total value for the land and timber of four hundred dollars, and no more; that the land is uninhabited; that it contains no mining or other improvements, nor, as I verily believe, any valuable deposit of gold, silver, cinnabar, copper, coal, or other

minerals, salt springs, or deposits of salt; that I have made no other application under said acts; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself; that since August 30, 1890, I have not entered and acquired title to, nor am I now claiming, under an entry made under any of the nonmineral public-land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres; that I am not a member of any association or a stockholder in any corporation which has filed an application and sworn statement under said act; and that my post office address is Index, Washington, at which place any notice affecting my rights under this application may be sent.

12 I request that notice be furnished me for publication in the ---------- newspaper, published

(The newspaper must be one of general circulation, published nearest the land.)

at ----------.

FRANCIS M. MCPHERSON.

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See Sec. 5392, R. S., below.)

In addition thereto, the money that may be paid for the land is forfeited, and all conveyances of the land, or of any right, title, or claim thereto, are absolutely null and void as against the United States.

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant has been satisfactorily identified before me by C. L. Byron, 322 White Bldg., Seattle, Wash.; that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described, and that said affidavit was duly subscribed and sworn to before me at my office, in Chehalis, Lewis County, Washington, within the Vancouver, Washington, land district, this 10th day of December, 1914.

W. A. WESTOVER,
U. S. Com. for Western Dist. of Washington,
Residing at Chehalis, Wash.

(W. A. Westover, United States Commissioner Western Dist of Washington.)

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United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See Sec. 1750.)

NOTE.—In addition to the above penalty, every person who knowingly or willfully in anywise procures the making or presentation of any false or fraudulent affidavit pertaining to any matter within the jurisdiction of the Secretary of the Interior may be punished by fine or imprisonment.

13 By getting the parties to be defrauded to go before W. A. Westover, then and there being a United States commissioner, for the purpose of certifying to said application, and for the further purpose of having said W. A. Westover forward by United States mail said letter, application, and money order to the United States land office at Vancouver, Washington; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count II.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That one Edward M. Comyns and one Carlos L. Byron, and each of them, on the tenth day of December, A. D. one thousand nine hundred and fourteen, at Chehalis, in the County of Lewis, within the Southern Division of the Western District of Washington, and within the jurisdiction of this court, having theretofore devised and intended to devise a scheme and artifice to defraud, which said scheme and artifice, its purpose and the means and manner by which it was to be effected is set out in the first count of this indictment, commencing with the words "one Carl S. Baker" in line 24, page one, to and including the words "with said agreement" in line 18, page 3, of said first count, and the first count within the limits aforesaid is herewith repeated and incorporated in this second count, for the purpose of executing said scheme and artifice and attempting so to do, did wilfully, knowingly, unlawfully and feloniously cause to be placed in the post office of the United States at Chehalis, Washington, and an authorized depository for mail matter at said Chehalis, to be sent and delivered by the Post Office Establishment of the United States, a letter addressed to Hon. Glenn N. Ranck, Reg., U. S. Land Office, Vancouver, Wash., enclos-

14 ing a timber and stone application and a United States post

office money order for ten dollars, which said letter and timber and stone application were in the following language, to wit:

"LAW OFFICE OF W. A. WESTOVER,
"*Chehalis, Washington, Dec. 10, 1914.*

"Hon. GLENN N. RANCK,
"*Reg., U. S. Land Office, Vancouver, Wash.*

"DEAR SIR: I enclose application for timber claim by Persis G. Ulrich and money order for $10.00 to cover fees.

"Yours truly,

"W. A. WESTOVER."

15 4—522.—Departmental regulations approved by the Secretary of the Interior November 30, 1908. Department of the Interior. Timber or stone entry. U. S. Land Office, Vancouver, Wash., Dec. 10, 1914. No. ———, Receipt No. ———.

Application and sworn statement.

[To be made in duplicate.]

I, Persis G. Ulrich (female), hereby make application to purchase the SW. ¼ SW. ¼, NW. ¼ SW. ¼, NE. ¼ SW. ¼, SE. ¼ NW. ¼, section 12, township 13 N., range 6 E., Willamette meridian, containing 160 acres, within the Vancouver, Washington, land district, in the State of Washington, and the timber thereon, at such value as may be fixed by appraisement, made under authority of the Secretary of the Interior, under the act of June 3, 1878, commonly known as the "timber and stone law," and acts amendatory thereof, and in support of this application I do solemnly swear that I am a native-born citizen of the United States, of the age of 34 years, and by occupation a housewife; that I from information and belief state that said land is unfit for cultivation and is valuable chiefly for its timber; and that to my best knowledge and belief, based upon said examination, the land is worth nothing dollars, and the timber thereon, which I estimate to be 1,000,000 feet, board measure, is worth four hundred dollars, making a total value for the land and timber of four hundred dollars, and no more; that the land is uninhabited; that it contains no mining or other improvements, nor, as I verily believe, any valuable deposit of gold, silver, cinnabar, copper, coal, or other minerals, salt springs, or deposits of salt; that I have made no other application under said acts; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself; that since August 30, 1890, I have not entered and acquired title to, nor am I now claiming, under an entry made under any of the nonmineral public-land laws, an

amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres; that I am not a member of any association, or a stockholder in any corporation which has filed an application and sworn statement under said act; and that my post-office address is Index, Washington, at which place any notice affecting my rights under this application may be sent.

16 I request that notice be furnished me for publication in the _____ newspaper, published

(The newspaper must be one of general circulation, published nearest the land.)

at _____.

PERSIS G. ULRICH.

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See sec. 5392, R. S., below.)

In addition thereto, the money that may be paid for the land is forfeited, and all conveyances of the land, or of any right, title, or claim thereto, are absolutely null and void as against the United States.

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant has been satisfactorily identified before me by C. L. Byron, 322 White Bldg., Seattle, Wash.; that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described, and that said affidavit was duly subscribed and sworn to before me at my office, in Chehalis, Lewis County, Washington, within the Vancouver, Washington, land district, this 10th day of December, 1914.

W. A. WESTOVER,

U. S. Com. for Western Dist. of Washington,

Residing at Chehalis, Wash.

(W. A. Westover, United States Commissioner Western Dist. of Washington.)

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Title LXX.—Crimes.—Chap. 4.

SEC. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See sec. 1750.)

NOTE.—In addition to the above penalty, every person who knowingly or willfully in anywise procures the making or presentation of any false or fraudulent affidavit pertaining to any matter within the jurisdiction of the Secretary of the Interior may be punished by fine or imprisonment.

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Application and sworn statement.

[To be made in duplicate.]

I, Persis G. Ulrich (female), hereby make application to purchase the SW¼ SW¼, NW¼ SW¼, NE¼ SW¼, SE¼ NW¼, section 12 township 13 N., range 6 E., Willamette meridian, containing 160 acres, within the Vancouver, Washington, land district, in the State of Washington, and the timber thereon, at such value as may be fixed by appraisement, made under authority of the Secretary of the Interior, under the act of June 3, 1878, commonly known as the "timber and stone law," and acts amendatory thereof, and in support of this application I do solemnly swear that I am a native born citizen of the United States, of the age of 34 years, and by occupation a housewife; that I, from information and belief, state that said land is unfit for cultivation and is valuable chiefly for its timber; and that to my best knowledge and belief, based upon said examination, the land is worth nothing dollars, and the timber thereon, which I estimate to be 1,000,000 feet, board measure, is worth four hundred dollars, making a total value for the land and timber of four hundred dollars and no more; that the land is uninhabited; that it contains no mining or other improvements, nor, as I verily believe, any valuable deposit of gold, silver, cinnabar, copper, coal, or other minerals, salt springs, or deposits of salt; that I have made no other application under said acts; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself; that since August 30, 1890, I have not entered and acquired title to, nor am I now claiming, under an entry made under any of the nonmineral public-land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres; that I am not a member of any association, or a stockholder in any corporation which has filed an application and sworn statement under said act; and that my post office address is Index, Washington, at which place any

notice affecting my rights under this application may be sent.
18 I request that notice be furnished me for publication in the
_____newspaper, published
(The newspaper must be one of general circulation, published nearest the land.)
at_____.

PERSIS G. ULRICH.

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See sec. 5392, R. S., below.)

In addition thereto, the money that may be paid for the land is forfeited, and all conveyances of the land, or of any right, title, or claim thereto, are absolutely null and void as against the United States.

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant has been satisfactorily identified before me by C. L. Byron, 322 White Bldg., Seattle, Wash.; that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described, and that said affidavit was duly subscribed and sworn to before me at my office, in Chehalis, Lewis County, Washington, within the Vancouver, Washington, land district, this 10th day of December, 1914.

W. A. WESTOVER,
U. S. Com. for Western Dist. of Washington,
Residing at Chehalis, Wash.

(W. A. Westover, United States Commissioner Western Dist. of Washington.)

Revised Statutes of the United States. Title LXX.—Crimes.—Chap. 4.

SEC. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by fine of not more than two thousand dollars, and by imprisonment at hard labor not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See sec. 1750.)

NOTE.—In addition to the above penalty, every person who knowingly or willfully in anywise procures the making or presentation of any false or fraudulent affidavit pertaining to any matter within the jurisdiction of the Secretary of the Interior may be punished by fine or imprisonment.

19 By getting the parties to be defrauded to go before W. A. Westover, then and there being a United States commissioner, for the purpose of certifying to said application and for the further purpose of having said W. A. Westover forward by United States mail said letter, application, and money order to the United States land office at Vancouver, Washington; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count III.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That one Edward M. Comyns and one Carlos L. Byron, and each them, on the twenty-second day of March, A. D. one thousand nine hundred and fifteen, at Chehalis, in the county of Lewis, within the southern division of the Western District of Washington, and within the jurisdiction of this court, having theretofore devised and intended to devise a scheme and artifice to defraud, which said scheme and artifice, its purpose, and the means and manner by which it was to be effected is set out in the first count of this indictment, commencing with the words "one Carl S. Baker" in line 24, page one, to and including the words "with said agreement" in line 18, page 3, of said first count, and the first count within the limits aforesaid is herewith repeated and incorporated in this third count for the purpose of executing said scheme and artifice and attempting so to do did wilfully, knowingly, unlawfully, and feloniously cause to be placed in the post office of *of* the United States at Chehalis, Washington, and an authorized depository for mail matter at said Chehalis, to be sent and delivered by the post-office establishment of the United States a letter addressed to Hon. Glenn N. Ranck, Reg., U. S. Land Office, Vancouver, Washington, enclosing a timber
20 and stone application and a United States post office money order for ten dollars, which said letter and timber and stone application were in the following language, to wit:

"LAW OFFICE OF W. A. WESTOVER,
"*Chehalis, Washington, March 22, 1915.*

"Hon. GLENN N. RANCH,
"*Reg., U. S. Land Office, Vancouver, Washington.*

"DEAR SIR: I enclose timber and stone entry application and affidavit of Charles H. Parent with money order for $10.00.

"Yours, truly,

"W. A. WESTOVER."

21 4—522.—Departmental regulations approved by the Secretary of the Interior November 30, 1908. Department of the Interior. Timber or stone entry. U. S. Land Office, Vancouver, Wash., March 22, 1915, No. ———, Receipt No. ———.

Application and sworn statement.

[To be made in duplicate.]

I, Charles H. Parent (male), hereby make application to purchase the W½ W½, section 21, township 6 N., range 5 E., Willamette meridian, containing 160 acres, within the Vancouver, Washington land district, in the State of Washington, and the timber thereon, at such value as may be fixed by appraisement, made under authority of the Secretary of the Interior, under the act of June 3, 1878, commonly known as the "timber and stone law," and acts amendatory thereof, and in support of this application I do solemnly swear that I am a naturalized citizen of the United States, of the age of 65 years, and by occupation a clerk; that I from information and belief state that said land is unfit for cultivation and is valuable chiefly for its timber; and that to my best knowledge and belief, based upon said examination, the land is worth nothing dollars, and the timber thereon, which I estimate to be 1,000,000 to 5,000,000 feet, board measure, is of unknown value, there being no market at present; that the land is uninhabited; that it contains no mining or other improvements, nor, as I verily believe, any valuable deposit of gold, silver, cinnabar, copper, coal, or other minerals, salt springs, or deposits of salt; that I have made no other application under said acts; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself; that since August 30, 1890, I have not entered and acquired title to, nor am I now claiming, under an entry made under any of the nonmineral public-land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres; that I am not a member of any association or a stockholder in any corporation which has filed an application and sworn statement under said act; and that my post-office address is Seattle, Washington, at which place any notice affecting my rights under this application may be sent.

22 I request that notice be furnished me for publication in the ---------- newspaper, published

(The newspaper must be one of general circulation, published nearest the land.)

at ----------.

CHARLES H. PARENT.

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See Sec. 5392, R. S., below.)

In addition thereto, the money that may be paid for the land is forfeited, and all conveyances of the land, or of any right, title, or claim thereto, are absolutely null and void as against the United States.

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant has been satisfactorily identified before me by C. L. Byron, 601 Central Bldg., Seattle, Wash.; that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described, and that said affidavit was duly subscribed and sworn to before me at my office, in Chehalis, Lewis County, Washington, within the Vancouver, Washington, land district, this 22nd day of March, 1915.

W. A. WESTOVER,
U. S. Com. for Western Dist. of Washington,
Residing at Chehalis, Wash.

(W. A. Westover, United States Commissioner Western Dist. of Washington.)

Revised Statutes of the United States.

Title LXX.—Crimes.—Chap. 4.

SEC. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See Sec. 1750.)

NOTE.—In addition to the above penalty, every person who knowingly or willfully in anywise procures the making or presentation of any false or fraudulent affidavit pertaining to any matter within the jurisdiction of the Secretary of the Interior may be punished by fine or imprisonment.

23 L. D.—522.—Departmental regulations approved by the Secretary of the Interior November 30, 1908. Department of the Interior. Timber or stone entry. U. S. Land Office, Vancouver, Wash., March 22, 1915, No. ———, Receipt No. ———.

Application and sworn statement.

[To be made in duplicate.]

I, Charles H. Parent (male), hereby make application to purchase the W. ½ W. ½ section 21, township 6 N., range 5 E., Willamette meridian, containing 160 acres, within the Vancouver, Washington, land district, in the State of Washington, and the timber thereon,

at such value as may be fixed by appraisement, made under authority of the Secretary of the Interior, under the act of June 3, 1878, commonly known as the "timber and stone law," and acts amendatory thereof, and in support of this application I do solemnly swear that I am a naturalized citizen of the United States, of the age of 65 years, and by occupation a ——; that I from information and belief state that said land is unfit for cultivation and is valuable chiefly for its timber; and that to my best knowledge and belief, based upon said examination, the land is worth nothing dollars, and the timber thereon, which I estimate to be from 1,000,000 to 5,000,000 feet, board measure, is of unknown value, there being no market at present; that the land is uninhabited; that it contains no mining or other improvements, nor, as I verily believe, any valuable deposit of gold, silver, cinnabar, copper, coal, or other minerals, salt springs, or deposits of salt; that I have made no other application under said acts; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself; that since August 30, 1890, I have not entered and acquired title to, nor am I now claiming, under an entry made under any of the nonmineral public-land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres; that I am not a member of any association or a stockholder in any corporation which has filed an application and sworn statement under said act; and that my post-office address is Seattle, Washington, at which place any notice affecting my rights under this application may be sent.

24 I request that notice be furnished me for publication in the ---------- newspaper, published

(The newspaper must be one of general circulation, published nearest the land.)

at ----------.

CHARLES H. PARENT.

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See Sec. 5392, R. S., below.)

In addition thereto, the money that may be paid for the land is forfeited, and all conveyances of the land, or of any right, title, or claim thereto, are absolutely null and void as against the United States.

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant has been satisfactorily identified before me by C. L. Byron, 601 Central Bldg., Seattle, Wash.; that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described, and that said affidavit was duly subscribed and sworn to before me

at my office, in Chehalis, Lewis County, Washington, within the Vancouver, Washington, land district, this 22nd day of March, 1915.

W. A. WESTOVER.

U. S. Com. for Western Dist. of Washington,
Residing at Chehalis, Wash.

(W. A. Westover, United States Commissioner Western Dist. of Washington.)

Revised Statutes of the United States.

Title LXX.—Crimes.—Chap. 4.

SEC. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See Sec. 1750.)

NOTE.—In addition to the above penalty, every person who knowingly or willfully in anywise procures the making or presentation of any false or fraudulent affidavit pertaining to any matter within the jurisdiction of the Secretary of the Interior may be punished by fine or imprisonment.

By getting the parties to be defrauded to go before W. A. Westover, then and there being a United States commissioner, for the purpose of certifying to said application, and for the further purpose of having said W. A. Westover forward by United States mail said letter, application, and money order to the United States land office at Vancouver, Washington, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Count IV.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That one Edward M. Comyns and one Carlos L. Byron, and each of them, on the nineteenth day of April, A. D. one thousand nine hundred and fifteen, at Chehalis, in the county of Lewis, within the Southern Division of the Western District of Washington, and within the jurisdiction of this court, having theretofore devised and intended to devise a scheme and artifice to defraud, which said scheme and artifice, its purpose and the means and manner by which

it was to be effected is set out in the first count of this indictment, commencing with the words "one Carl S. Baker" in line 24, page one, to and including the words "with said agreement" in line 18, page 3, of said first count, and the first count within the limits aforesaid is herewith repeated and incorporated in this fourth count, for the purpose of executing said scheme and artifice and attempting so to do, did wilfully, knowingly, unlawfully, and feloniously cause to be placed in the post office of the United States at Chehalis, Washington, and an authorized depository for mail matter at said Chehalis, to be sent and delivered by the post office establishment of the United States, a letter addressed to Hon. Glenn N. Ranck, Reg.

U. S. Land Office, Vancouver, Wash., enclosing a timber and
26 stone application and a United States post office money order for ten dollars, which said letter and timber and stone application were in the following language, to wit:

"LAW OFFICE OF W. A. WESTOVER,
"*Chehalis, Washington, April 19, 1915.*

"Hon. GLENN N. RANCK,
"*Reg., U. S. Land Office, Vancouver, Wash.*

"DEAR SIR: Find enclosed timber entry application of Oscar H. Mack with money order for ten dollars.

"Yours, truly,

"W. A. WESTOVER."

27 4—522.—Departmental regulations approved by the Secretary of the Interior, November 30, 1908. Department of the Interior. Timber or stone entry. U. S. Land Office, Vancouver, Wash., April 14, 1915, No. ———. Receipt No. ———.

Application and sworn statement.

[To be made in duplicate.]

I, Oscar H. Mack (male), hereby make application to purchase the NE. ¼, section 19, township 6 N., range 5 E., Willamette meridian, containing 160 acres, within the Vancouver, Washington, land district, in the State of Washington, and the timber thereon, at such value as may be fixed by appraisement, made under authority of the Secretary of the Interior, under the act of June 3, 1878, commonly known as the "timber and stone law," and acts amendatory thereof, and in support of this application I do solemnly swear that I am a native-born citizen of the United States, of the age of 36 years, and by occupation a ; that I, from information and belief, state that said land is unfit for cultivation and is valuable chiefly for its timber; and that to my best knowledge and belief, based upon said information, the land is worth nothing dollars, and the timber thereon, which I estimate to be about 1,000,000 feet, board measure, is of unknown value, there being no market at present; that the land is uninhabited; that it contains no mining or other improvements, nor, as I verily believe, any valuable deposit of gold, silver, cinnabar, copper, coal, or other minerals, salt springs, or

deposits of salt; that I have made no other application under said acts; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself; that since August 30, 1890, I have not entered and acquired title to, nor am I now claiming, under an entry made under any of the nonmineral public-land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres; that I am not a member of any association, or a stockholder in any corporation which has filed an application and sworn statement under said act; and that my post-office address is 613 22nd Avenue, Seattle, Washington, at which place any notice affecting my rights under this application may be sent.

28 I request that notice be furnished me for publication in the _____ news-
(The newspaper must be one of general circulation, published nearest the land.)
paper, published at _____.

OSCAR H. MACK.

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See sec. 5392, R. S., below.)

In addition thereto, the money that may be paid for the land is forfeited, and all conveyances of the land, or of any right, title, or claim thereto, are absolutely null and void as against the United States.

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant has been satisfactorily identified before me by J. E. McReynolds, 601 Central Bldg., Seattle, Wash.; that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described, and that said affidavit was duly subscribed and sworn to before me at my office, in Chehalis, Lewis County, Wash., within the Vancouver, Washington, land district, this 14th day of April, 1915.

W. A. WESTOVER,
U. S. Com. for Western Dist. of Washington,
Residing at Chehalis, Wash.

(W. A. Westover, United States Commissioner Western Dist. of Washington.)

Revised Statutes of the United States.

Title LXX.—Crimes.—Chap. 4.

SEC. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will

testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by fine of not more than two thousand dollars, and by imprisonment at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See sec. 1750.)

NOTE.—In addition to the above penalty, every person who knowingly or willfully in anywise procures the making or presentation of any false or fraudulent affidavit pertaining to any matter within the jurisdiction of the Secretary of the Interior may be punished by fine or imprisonment.

29 4—522.—Departmental regulations approved by the Secretary of the Interior, November 30, 1908. Department of the Interior. Timber or stone entry. U. S. Land Office, Vancouver, Wash., April 14, 1915. No. ———. Receipt No. ———.

Application and sworn statement.

[To be made in duplicate.]

I, Oscar H. Mack (male), hereby make application to purchase the NE. ¼, section 19, township 6 N., range 5 E., Willamette meridian, containing 160 acres, within the Vancouver, Washington, land district, in the State of Washington, and the timber thereon, at such value as may be fixed by appraisement, made under authority of the Secretary of the Interior, under the act of June 3, 1878, commonly known as the "timber and stone law," and acts amendatory thereof, and in support of this application I do solemnly swear that I am a native born citizen of the United States, of the age of 36 years, and and by occupation a salesman; that I, from information and belief, state that said land is unfit for cultivation and is valuable chiefly for its timber; and that to my best knowledge and belief, based upon said information, the land is worth nothing dollars, and the timber thereon, which I estimate to be about 1,000,000 feet, board measure, is of unknown value, there being no market at present; that the land is uninhabited; that it contains no mining or other improvements, nor, as I verily believe, any valuable deposit of gold, silver, cinnabar, copper, coal, or other minerals, salt springs, or deposits of salt; that I have made no other application under said acts; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself; that since August 30, 1890,

I have not entered and acquired title to, nor am I now claiming, under an entry made under any of the nonmineral public-land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres; that I am not a member of any association, or a stockholder in any corporation which has filed an application and sworn statement under said act: and that my post office address is 613 22nd Avenue, Seattle, Washington, at which place any notice affecting my rights under this application may be sent.

I request that notice be furnished me for publication in the ---------- news-
(The newspaper must be one of general circulation, published nearest the land.)
paper, published at----------

OSCAR H. MACK.

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See sec. 5392, R. S., below.)

In addition thereto, the money that may be paid for the land is forfeited, and all conveyances of the land, or of any right, title, or claim thereto, are absolutely null and void as against the United States.

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant has been satisfactorily identified before me by J. E. McReynolds, 601 Central Bldg., Seattle, Wash.; that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described, and that said affidavit was duly subscribed and sworn to before me at my office, in Chehalis, Lewis County, Wash., within the Vancouver, Washington, land district, this 14th day of April, 1915.

W. A. WESTOVER.
U. S. Com. for Western Dist. of Washington
Residing at Chehalis, Wash.

(W. A. Westover, United States Commissioner Western Dist. of Washington.)

Revised Statutes of the United States.
Title LXX.—Crimes.—Chap. 4.

SEC. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by fine of not more than two thousand dollars, and by imprisonment at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See sec. 1750.)

NOTE.—In addition to the above penalty, every person who knowingly or willfully in anywise procures the making or presentation of any false or fraudulent affidavit pertaining to any matter within the jurisdiction of the Secretary of the Interior may be punished by fine or imprisonment.

31 By getting the parties to be defrauded to go before W. A. Westover, then and there being a United States commissioner, for the purpose of certifying to said application and for the further purpose of having said W. A. Westover forward by United States mail said letter, application, and money order to the United States land office at Vancouver, Washington, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

CLAY ALLEN,
United States Attorney.
G. P. FISHBURNE,
Assistant United States Attorney.

(Endorsed:) No. 2217. United States District Court. Western District of Washington, Southern Division. The United States vs. Edward M. Comyns and Carlos L. Byron. Indictment for Vio. Sec. 215 Penal Code. A true bill. Arthur Boucher, foreman grand jury. Presented to the court by the foreman of the grand jury in open court in the presence of the grand jury and filed in the U. S. District Court June 8, 1917. Frank L. Crosby, clerk. By F. M. Harshberger, deputy.

32 In the District Court of the United States, Western District of Washington, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF. *vs.* EDWARD M. COMYNS AND CHARLES L. BYRON, defendants.	No. 2217.

Demurrer.

Come now the above-named defendants and demur to the indictment in the above-entitled matter and to each and every count thereof on the following grounds and for the following reasons, to wit:

I.

That the above-entitled court is without jurisdiction of the subject matter herein.

II.

That said indictment and each and every count thereof fails to state facts sufficient to charge a crime against said defendants or either of them.

III.

That said indictment and each and every count thereof is not specific enough and is too vague, indefinite, ambiguous, and uncertain to charge any facts sufficient to constitute a crime or offense.

IV.

That said indictment and each and every count thereof is insufficient in law to charge any offense against the defendants
33 or either of them.

V.

That said indictment was not brought within the time required by law.

P. V. DAVIS,
Attorney for Defendants.

Recd. copy June 11–1917.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jun. 11, 1917. Frank L. Crosby, clerk. By F. M. Harshberger, deputy.

34 *Journal order overruling demurrer.*

At a regular session of the United States District Court for the Western District of Washington, Southern Division, held at Tacoma on the 18th day of June, 1917, the Honorable Edward E. Cushman, United States district judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal of said court, to wit:

UNITED STATES OF AMERICA
vs.
EDWARD M. COMYNS AND CARLOS L. BYRON. } No. 2217.

This cause coming on at this time for a hearing on demurrer to the indictment herein, the demurrer is overruled, but the Government is required to furnish a bill of particulars stating the reason why the land in question could not be secured by the applicants.

35 In the United States District Court for the Western District of Washington, Southern Division.

February term, 1917.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
EDWARD M. COMYNS AND CARLOS L. BYRON,
defendants. } No. 2217.

Bill of particulars.

Comes now the plaintiff in the above-entitled action and sets out as a bill of particulars, according to the ruling of the court, that "the defendants could not locate said parties and could not secure

for them the preference right to purchase from the United States of America the land above mentioned for the sum of two and 50/100 ($2.50) dollars per acre by filing said application," on the following grounds:

That Carl S. Baker's claim was in conflict the State indemnity selection.

That Charles H. Parent was in conflict with Clarke's lieu selection, and because the land had not been examined in person.

That Oscar H. Mack's claim was thrown out because the land had not been examined in person.

That Harry N. McDonald's application was in conflict with the State indemnity selection, and likewise A. R. McDonald and Leo S. McDonald's.

That the claims of Francis M. McPherson and William F. Ulrich and his wife, Persis G. Ulrich, were in conflict with the State indemnity selection and in coal land withdrawal, Washington
36 No. 1.

That the above bill of particulars is in accordance with the ruling of the court, as interpreted by the plaintiff.

G. P. FISHBURNE.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jun. 20, 1917. Frank L. Crosby, clerk. By F. M. Harshberger, deputy.

37 In the United States District Court for the Western District of Washington, Southern Division.

February term, 1917.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* EDWARD M. COMYNS AND CARLOS L. BYRON, defendants.	No. 2217.

Amended bill of particulars.

Comes now the plaintiff in the above-entitled action and sets out as a bill of particulars, according to the ruling of the court, that "the defendants could not locate said parties and could not secure for them the preference right to purchase from the United States of America the land above mentioned for the sum of two and 50/100 ($2.50) dollars per acre by filing said application" on the following grounds:

That Carl S. Baker's claim was in conflict with the State indemnity selection.

That Charles H. Parent was in conflict with Clarke's lieu selection and because the land had not been examined in person, as shown by

the application, and because his application was defective in this: That it read "I, from information and belief, state that said land" instead of saying that on a certain date he examined said lands and from "my personal knowledge state, etc."

That Oscar H. Mack's claim was thrown out because the land had not been examined in person, as shown by the application, and on the ground that the application was defective in that it read,
38 "I, from information and belief, state," instead of saying that "I did on the ——— day of ——— examine said land, and from my personal knowledge state," as is required by the Department of the Interior.

That Harry N. McDonald's application was in conflict with the State indemnity selection, and likewise A. R. McDonald and Leo S. McDonald's.

That the claims of Francis M. McPherson and William F. Ulrich and his wife, Persis G. Ulrich, were in conflict with the State indemnity selection and in coal land withdrawal, Washington No. 1, and that the applications of McPherson and Persis G. Ulrich were defective in the same way as the Mack and Parent applications, above set forth, and because the land had not been examined as shown by the applications.

G. P. FISHBURNE.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jun. 25, 1917. Frank L. Crosby, clerk. By F. M. Harshberger, deputy.

39 In the United States District Court for the Western District of Washington, Southern Division.

February term, 1917.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* EDWARD M. COMYNS AND CARLOS L. BYRON, defendants.	No. 2217.

Demurrer to indictment

Comes now the above-named defendants, and without waiving their objections to the alleged and purported bill of particulars herein and demur to the indictment as sided by said bill of particulars and each and every count thereof on the following grounds, to wit:

I.

That the court is without jurisdiction of the subject matter herein.

II.

That said indictment, as aided by said bill of particulars, and each and every count thereof fails to set forth facts sufficient to charge any crime or misdemeanor.

III.

That said indictment, and each and every count thereof, as aided by said bill of particulars, is too indefinite, ambiguous, and uncertain to fully inform the defendants of the charge against them
40 or to make the same clear to the common understanding.

IV.

That said indictment, and each and every count thereof as aided by said bill of particulars, is insufficient in law.

V.

That said indictment was not brought within the time required by law.

P. V. DAVIS,
Attorney for Defendants.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jun. 23, 1917. Frank L. Crosby, clerk. By F. M. Harshberger, deputy.

41 In the United States District Court for the Western District of Washington, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
EDWARD M. COMYNS AND CARLOS L. BYRON, defendants. } No. 2217.

Motion to strike from bill of particulars.

Come now the above-named defendants, and move to strike from the alleged bill of particulars filed herein, in aid of the original indictment, the following portions, to wit:

1. The defendants move to strike the following words, namely: "That Carl S. Baker's claim was in conflict the State indemnity selection" found on lines 18 and 19, on the grounds that the same is indefinite, incomplete, and ambiguous, and does not strengthen or aid the indictment or clarify the same, and does not conform to the order of the court requiring the same, and on the further ground that the alleged "State indemnity selection" is invalid, and that said

bill of particulars does not allege that the purported State indemnity selection has even been certified or approved, or that the land embraced therein was segregated thereby, or that said State indemnity selection was superior to the timber land application of the said Baker, and does not show "why the defendants could
42 not locate said parties and could not secure for them the preference right to purchase from the United States of America the land * * * for the sum of $2.50 per acre by filing said application," or that said land is not a part of the great body of the public domain subject to disposition under the public-land laws.

2. Defendants move to strike the following from said bill of particulars, viz: "That Charles H. Parent was in conflict with Clarke's lieu selection" and "because the land had not been examined in person," on the grounds above mentioned and also on the further grounds that it is not alleged that said "Clarke's lieu selection" was superior to that of the timber land application of said Charles H. Parent, or that "said Clarke's lieu selection" constituted a valid appropriation of said land, or that said land was not a part of the great body of the public domain subject to disposition under the public-land laws, and for the further reason that it is immaterial whether said Parent had or had not examined said land in person.

3. Defendants move to strike from said bill of particulars the following words: "That Oscar H. Mack's claim was thrown out because the land had not been examined in person," for the reasons set forth in the preceding objections.

4. Defendants move to strike from said bill of particulars the following: "That Harry M. McDonald's application was in conflict with the State indemnity selection and likewise A. R. McDonald and Leo S. McDonald's," for the reasons set forth in the preceding objections.

5. Defendants further move to strike from said bill of particulars the following, viz: "That the claims of Francis M. McPherson and William P. Ulrich and his wife, Persis G. Ulrich, were in conflict with the State indemnity selection and in Coal Land
43 Withdrawal No. 1," on the grounds set forth in the preceding objections and for the further reason that no alleged coal land withdrawal would bar the initiation of claim to and entry of said land under the proviso to the 3rd section of the act of June 22, 1910 (36 Stat., 583).

This motion is addressed to said bill of particulars so far as the same may refer to or be construed as a part of each and every one of the counts in said indictment.

P. V. Davis,
Attorney for Defendants.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, June 23, 1917. Frank L. Crosby, clerk. By F. M. Harshberger, deputy.

44 In the District Court of the United States, Western District of Washington, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
EDWARD M. COMYNS AND CARLOS L. BYRON, defendants. } No. 2217.

Memorandum decision, filed July 2, 1917.

George P. Fishburne, assistant U. S. attorney, for plaintiff.
P. V. Davis, for defendants.

CUSHMAN, District Judge.

A demurrer in this case was heretofore overruled upon the condition that the plaintiff would, by bill of particulars, show what it was which rendered it impossible for the defendants to make good the representations and promises contemplated in the alleged scheme to defraud.

The district attorney has filed a bill of particulars setting out that timber and stone filings would have conflicted with lists of State selections which, it is admitted, were filed for lands in lieu of sections 16 and 36, included, since the admission of the State of Washington, in certain forest reservations; that the representations were further false in that the applications for purchase under the timber and stone act, the subject of the contemplated representations,
45 were not as required by the rules of the General Land Office requiring the lands to be examined in person by the applicant and the application to allege that the statements concerning the character of the land were made from the applicant's personal knowledge.

The defendants move to strike the bill of particulars. It will be more in conformity with the practice in criminal cases to treat the motion as a petition to reargue and rehear the demurrer to the indictment as amplified by the bill of particulars.

Upon further reflection I am inclined to the view that the reasoning in the Whitney case is controlling upon the first point. Giving full affect to the late case of the State of California vs. Deseret Water, Oil & Irrigation Co. (decided by the Supreme Court March 26, 1917), holding, in effect, that the amendment of 1891 to sections 2275 and 2276, R. S., affords statutory authority for the exchange by a State of granted lands to which it holds full title for other lands of the United States, yet the Whitney case is still distinguishable as sections 2275 and 2276, R. S., amended by the law of 1891, were adopted after California became a State and after that State acquired its interest in its school lands, and such sections of the Revised Statutes being a general law would apply to school-land grants theretofore made, whereas the grant made by the enabling act of 1889 to the State of Washington was a later and special act making

special provisions concerning the lands granted, among others being, "and such lands shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be preserved for school purposes only."

It may be that ordinarily the filing of a State's list of selections would withdraw the land from entry so as to prevent initiation, by an applicant under the timber and stone act, of any right by the filing or offered filing thereof until the prior entry (if it may be so called) of the State was stricken or set aside. Hope vs. Murphy, 207 U. S., 407.

But I take it that this latter ruling is not applicable where, under the law, as decided in the Whitney case, the State is not authorized, as a matter of law, to initiate any such right as that claimed. The rule, no doubt, is applicable in cases where inquiry into the facts requires the taking of testimony.

Upon the latter point, as to the rule of the General Land Office requiring the lands to be examined in person by the applicant and his application to show that the statements concerning the character of the land were made from his personal knowledge, I deem the decision of the Circuit Court of Appeals of the Seventh Circuit (Hoover vs. Salling, 110 Fed., 43) binding upon this court, as no contrary decision has been called to my attention. It is true that, in the late case of The United States vs. Jesse T. Morehead (decided by the Supreme Court April 30, 1917), the court held that the Land Department, being charged with the duty of enforcing the public-land laws by appropriate regulations and the requirement of the soldier's affidavit as to the essential facts being reasonable and appropriate, it was valid as a regulation and not in effect legislation, as it did not add a new requirement in exacting the affidavit, as was the case in Wiliamson vs. U. S., 207 U. S., 425.

But the Morehead case was one solely concerning the authority of the Land Office to regulate its procedure; that is, whether it could make a rule as to form of the evidence that it would require and insist upon an affidavit. The present rule is not one of practice as to sworn or unsworn statements, pleadings, or testimony; but it is a requirement, in effect, that the applicant shall, in person, visit the land desired before making application therefor, something not required of him by law.

Aside from the foregoing I deem the indictment demurrable. The alleged scheme is described as follows:

"That Edward M. Comyns and Carlos L. Byron, and each of them, should represent that said Edward M. Comyns was a lawyer admitted to practice before the United States Land Office, and that said Carlos L. Byron was a locator, and that they could locate said parties and secure for them the preference right to purchase from the United States of America, under the timber and stone act of

June 3, 1878, certain land within the Western District of Washington, for the sum of two and 50/100 dollars ($2.50) per acre, by filing an application to purchase under said act, and that the said property was worth more than that sum; and that they would agree with said parties to be defrauded that they would charge from one hundred dollars to one thousand dollars a piece as a fee for locating said parties and securing for them title to said land above mentioned, and that a part of said fee, hereinafter called the initial fee, should be paid at the time of their making the agreement, and the balance of said fee should be paid at the time said parties to be defrauded secured their title to said land, and that if said parties to be defrauded failed to get title to said land, then the said defendants, and each of them, would refund to said parties to be defrauded the amount of the fee already so paid to said defendants; whereas as a matter of fact, as the defendants and each of them well knew, the said defendants could not locate said parties and could not secure for them the preference right to purchase from the United States of America the land above mentioned for the sum of two and 50/100 dollars ($2.50) per acre by filing said application; and the agreement, as to the land, to be performed in consideration of the payment of said fee was for the purpose of securing the payment of said initial fee and for the purpose of delaying the said parties to be defrauded from demanding the repayment of said initial fee and for the purpose of preventing said parties to be defrauded from discovering the fact that they had been defrauded and disclosing said fact to others, and said defendants and each of them intended to appropriate to their own use and the use of each of said defendants said initial fee, and did not intend to refund said initial fee, or any part thereof, if said parties to be defrauded failed to get title to said land in accordance with said agreement."

48 In such a scheme to defraud, one, in effect, for obtaining money by false promises, among other things, it is necessary to allege and show that the promise was false; that it was known by the defendants to be false when made; that it was made, or to be made, with the intention that it should be believed and relied upon and money paid upon reliance upon its truth.

If it be conceded that the first two of the foregoing requirements are made by the present indictment there is no allegation that it was the purpose and intent of the defendants in making the alleged false representations and promises to thereby induce their victims to either enter into the alleged agreement with the defendants or part with their money.

For the failure to so allege I hold the indictment demurrable.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jul. 2, 1917. Frank L. Crosby, clerk. By F. M. Harshberger, deputy.

49 In the District Court of the United States, Western District of Washington, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
v.
EDWARD M. COMYNS AND CARLOS L. BYRON, defendants. } No. 2217.

Judgment sustaining demurrer.

This case originally came on for hearing on a motion to strike and to make more definite and certain and on a demurrer to the indictment, and the court heard the motions and the demurrer at the same time, and the court overruled the demurrer upon the condition that the plaintiff would, by a bill of particulars, show what it was which rendered it impossible for the defendants to make good their representations and promises contemplated in the alleged scheme to defraud.

And the plaintiff having complied with the order of the court by filing an amended bill of particulars and the court having considered the demurrer as going to the indictment as amplified by the amended bill of particulars and by admission that the timber and stone filings were in conflict with lists of State selections filed for lands in lieu of sections sixteen and thirty-six, or such portions thereof as were included since the admission of the State of Washington in certain forest reservations, and finding that the demurrer to the said indictment as amplified by the said amended bill of particulars and said admissions should be sustained.

Wherefore, it is hereby ordered that ~~said~~ demurrer to the said indictment as modified and amplified by the amended bill of particulars and the said admissions be and is hereby sustained.

50 Done in open court this 12th day of July, 1917.

EDWARD E. CUSHMAN, *Judge.*

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jul. 12, 1917. Frank L. Crosby, clerk. By F. M. Harshberger, deputy.

51 In the District Court of the United States, Western District of Washington, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
v.
EDWARD M. COMYNS AND CARLOS L. BYRON, defendants. } No. 2217.

Bill of exceptions.

The above-entitled action first came on for argument on a motion to strike and a motion to make more definite and certain and a de-

murrer to the indictment, and the court heard all of the motions and the demurrer at the same time, and it was determined that the demurrer would be overruled upon the condition that the plaintiff, by a bill of particulars, show what it was which rendered it impossible for the defendants to make good the representations and promises contemplated in the alleged scheme to defraud.

The plaintiff conformed to the order of the court by filing a bill of particulars, and before the hearing the bill of particulars was withdrawn and made more full by an amended bill of particulars in the following language, to wit:

"In the District Court of the United States, Western District of Washington, Southern Division.

"*February term, 1917.*

"UNITED STATES OF AMERICA, PLAINTIFF,
"*vs.*
"EDWARD M. COMYNS AND CARLOS L. BYRON,
"defendants.
} "No. 2217.

"*Amended bill of particulars.*

52 "Comes now the plaintiff in the above-entitled action and sets out as a bill of particulars, according to the ruling of the court, that 'the defendants could not locate said parties and could not secure for them the preference right to purchase from the United States of America the land above mentioned for the sum of two and 50/100 ($2.50) dollars per acre by filing said application' on the following grounds:

"That Carl S. Baker's claim was in conflict with the State indemnity selection.

"That Charles H. Parent was in conflict with Clarke's lieu selection and because the land had not been examined in person, as shown by the application, and because his application was defective in this: That it read: 'I, from information and belief, state that said land' instead of saying that on a certain date he examined said land and from 'my personal knowledge state, etc.'

"That Oscar H. Mack's claim was thrown out because the land had not been examined in person, as shown by the application, and on the ground that the application was defective in that it read, 'I, from information and belief, state,' instead of saying that 'I did on the ——— day of ——————— examine said land, and from my personal knowledge state,' as is required by the Department of the Interior.

"That Harry N. McDonald's application was in conflict with the State indemnity selection and likewise A. R. McDonald and Leo. S. McDonald's.

"That the claims of Francis M. McPherson and William F. Ulrich and his wife, Persis G. Ulrich, were in conflict with the State in-

demnity selection and in coal land withdrawal, Washington No. 1, and that the applications of McPherson and Persis G. Ulrich were defective in the same way as the Mack and Parent applications, above set forth, and because the land had not been examined as shown by the applications.

"G. P. FISHBURNE."

And it was then agreed by the counsel on both sides that the motion to strike and the demurrer of the defendants should be considered as being made to the indictment as amplified by the amended bill of particulars.

And it was further admitted and agreed by the attorneys on both sides of the controversy that the timber and stone applications and filings of Carl S. Baker, Harry N. McDonald, A. R. McDonald, Leo S. McDonald, Francis M. *M.* McPherson, William F. Ulrich, and his wife, Persis G. Ulrich, were in conflict with lists of State
53 selections which were filed for lands in lieu of such parts of sections sixteen and thirty-six as were included since the admission of the State of Washington in certain forest reservations made by the United States.

And the court, on considering the demurrer to the indictment as amplified by the amended bill of particulars and by the admission and agreement above set forth, decided that the demurrer should be sustained and entered the proper orders in accordance with such decision.

EDWARD E. CUSHMAN, *Judge.*
G. P. FISHBURNE,
Assistant United States Attorney.

O. K.

P. V. DAVIS,
Attorney for Defendants.

Order settling bill of exceptions.

UNITED STATES OF AMERICA,
Western District of Washington, ss:

On this 12th day of July, A. D. nineteen hundred and seventeen, the above entitled cause coming on for hearing on application and notice of plaintiff to settle bill of exceptions and the amendments proposed thereto in the cause, and it appearing to the court that the plaintiff and defendant have agreed upon the bill of exceptions as above set forth, and that both parties now consent to the signing and settling of said bill of exceptions as above set forth, and it further appearing to the court that said bill of exceptions contains all of the material and necessary matters and things occurring up to and at the time of the order sustaining the demurrer.

Wherefore upon motion of George F. Fishburne, assistant
54 U. S. attorney, and attorney for the plaintiff,

It is hereby ordered that the above bill of exceptions as amended by the same is hereby settled as a true bill of exceptions in

said cause; that the same is hereby certified accordingly by the undersigned judge of this court, who presided at the trial of said cause, as a true, full, and correct bill of exceptions, and the clerk of this court is hereby ordered to file the same as a record in said cause and transmit the same to the honorable Supreme Court of the United States.

Done in open court this 12th day of July, 1917.

EDWARD E. CUSHMAN, *Judge.*

Service of the foregoing bill of exceptions and receipt of copy thereof is hereby admitted the 12th day of July, 1917.

P. V. DAVIS,
Attorney for Defendants.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jul. 12, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

55 United States District Court, Western District of Washington, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
v.
EDWARD L. COMYNS AND CHARLES L. BYRON, defendants. } No. 2217.

Assignment of errors.

To the District Court of the United States for the Western District of Washington, sitting in the Southern Division:

The plaintiff, the United States of America, in this cause in connection with its petition for a writ of error, makes the following assignment of error which it avers exist:

I.

The court erred in sustaining the demurrer of the defendants to the indictment.

II.

The court erred in not holding that the case of State of California v. Deseret Water Oil and Irrigation Co. (decided by the Supreme Court March 26, 1917) held that the amendment of 1891 to sections 2275 and 2276, R. S., afforded statutory authority for the exchange by the State of Washington of sections 16 and 36, its school lands, for other lands of the United States when said school lands were taken by the United States for a forest reserve.

III.

The court erred in holding that section 2275 and 2276, R. S., as amended by the law of 1891, did not allow the State of Washington to exchange that part of sections 16 and 36, the school lands
56 of the State taken by the Government for forest reserves and other purposes of the Government. and take in its place other public lands of the Government lying within the State of Washington.

IV.

The court erred in holding that the case of State v. Whitney, 66 Wash., 473, controlled in this case and that under the ruling in the Whitney case and under a proper interpretation of the statute the amendment of 1891 was not applicable to the State of Washington and that the State of Washington did not have the right to make indemnity selection from the public lands of the State of Washington to indemnify the said State lands for such parts of sections 16 and 36 as should have been lost to the United States Government on account of forest reservation or other purposes of the Government.

V.

The court erred in not holding that the defendants could not locate the parties to be defrauded and could not secure for them a preference right to purchase from the United States of America by filing an application for land in conflict with State indemnity selections as was set forth by the bill of particulars as to the Baker claim, the claims of Harry N. McDonald, A. R. McDonald, and Leo S. McDonald, respectively, and also the claims of Francis M. McPherson and the claim of William F. Ulrich and his wife, Persis G. Ulrich.

VI.

The court erred in not holding that the defendants could not locate the parties to be defrauded and could not secure for them the preference right to purchase from the United States the land in question by filing an application reading, "I, from information and belief, state that said land," instead of saying, as required by the Land Department, that "On a certain date I examined said land and from my personal knowledge state."

57 VII.

The court erred in not holding that the defendants could not locate said parties to be defrauded, and could not secure for them the preference right to purchase from the United States of America the land applied for by filing the application when the defendants filed such applications as the bill of particulars showed in the case were filed on behalf of Charles H. Parent and Oscar H. Mack.

VIII.

The court erred in not holding that such applications as those of Francis M. McPherson, Persis G. Ulrich, Charles H. Parent, and Oscar H. Mack, all set forth in the indictment and appearing to have the words, "I, from information and belief, state that said lands," instead of saying that "On a certain date I examined said land and from my personal knowledge state," conferred any right whatever on the applicants, and in not holding that such an application could not locate the parties and could not secure for said parties the preference right to purchase from the United States of America, or any right.

IX.

The court erred in not holding that the filing by the State of Washington of its list of indemnity selections would withdraw the land from entry so as to prevent the initiation by an applicant under the timber and stone act until the State's selection was stricken or set aside.

X.

The court erred in not holding that the filing of a State list of indemnity selections for lands lost by forest reserves withdrew such land from entry so as to prevent the initiation by an applicant under the timber and stone act of any right at all by the filing or offered filing under said act until the prior entry or selection of the State was stricken or set aside by the Land Office.

58

XI.

The court erred in holding that the rule as set forth in assignment No. X was not applicable where under the law the State was not authorized to initiate any such right as that claimed by said State.

XII.

The court erred in holding that the rule laid down in assignment No. X was only applicable in cases where inquiry into the facts required the taking of testimony.

XIII.

The court erred in holding that the ruling in Holt v. Murphy, 207 U. S., 407, was not applicable to this case.

XIV.

The court erred in not holding that the filing of the State of Washington's indemnity selections would withdraw the lands from entry, and that pending the disposition of a school-land indemnity

selection, though erroneously received, no other application including any portion of the land embraced in such selection could be accepted, nor would any rights whatever be considered as initiated by the tender of such application.

XV.

The court erred in holding that filing of a State's list of selections would not withdraw the land from entry, so as to prevent the initiation by an application under the timber and stone act where as a matter of law the State was not authorized to initiate any such right as that claimed by said State.

XVI.

The court erred in holding that the State of Washington was not authorized as a matter of law to initiate any right by its filing its indemnity selection.

59

XVII.

The court erred in not holding that the State of Washington has a right to make indemnity selections just as the State of California and any other State filing under the amendment of 1891 to sections 2275 and 2276, R. S.

XVIII.

The court erred in not holding that sections 2275 and 2276 as amended by the act of 1891 were not applicable to the State of Washington.

XIX.

The court erred in holding that the indictment was in effect one for obtaining money by false promises, and it was therefore necessary to allege that the promise was false, that it was known by defendants to be false when made, that it was made, or to be made, with the intention that it should be believed and relied upon and money paid upon reliance upon its truth.

XX.

The court erred in holding that it was necessary for the indictment to allege that "it was the purpose and intent of the defendants in making the alleged false representations and promises to thereby induce their victims to either enter into the alleged agreement with the defendants or part with their money."

XXI.

That if the allegation set forth in the foregoing assignment of error was necessary the court erred in not finding that the indictment when read together sufficiently shows that the purpose and intent of the defendants in making the alleged false representations and promises was to thereby induce their victims to either enter into the alleged agreement with the defendants or part with their money.

XXII.

The court erred in not holding that Coal Land Entry No. 1
60 prevented Francis M. McPherson and William F. Ulrich and his wife, Persis G. Ulrich, from getting any rights by filing their timber and stone applications.

XXIII.

The court erred in holding that the indictment as amplified by the bill of particulars and admissions did not state a cause of action under section 215 of the Penal Code and that the demurrer should be sustained.

Wherefore said plaintiff and plaintiff in error prays that the judgment of said court sustaining the demurrer be reversed and that the court be directed to overrule said demurrer, and that each and every one of the errors of law made by the court be corrected and for such other and further relief as is just and proper in the premises.

CLAY ALLEN,
United States Attorney.
G. P. FISHBURNE,
Assistant United States Attorney.

Service of the within assignment of errors by delivery of a copy to the undersigned is hereby acknowledged this 12th day of July, 1917.

P. V. DAVIS,
Attorney for Defendants.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jul. 12, 1917. Frank L. Crosby, clerk. By F. M. Harshberger, deputy.

61 United States District Court, Western District of Washington, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF, *v.* EDWARD M. COMYNS AND CHARLES L. BYRON, DEFENDANTS.	No. 2217

Petition for writ of error.

Comes now the above-named plaintiff and respectfully shown: That on the 12th day of July, 1917, the court entered judgment sus-

taining a demurrer to the indictment as amplified by the bill of particulars herein.

That on said judgment and the proceedings had prior thereunto in this cause, certain errors were committed, to the prejudice of the said plaintiff, all of which will more in detail appear from the assignment of errors which is filed herewith.

Your petitioner, said plaintiff, feeling itself aggrieved by said judgment, herewith petitions this honorable court for an order allowing him to prosecute a writ of error to the United States Supreme Court under the rules of said court in such cases made and provided.

Wherefore your petitioner, said plaintiff, prays that a writ of error issue in this behalf to the United States Supreme Court, for the correction of error so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenti-
62 cated, may be sent to the said United States Supreme Court.

CLAY ALLEN,
United States Attorney.
G. P. FISHBURNE,
Assistant United States Attorney.

Service of the foregoing petition, and the receipt of a copy thereof, is hereby admitted this 12 day of July, 1917.

P. V. DAVIS,
Attorney for Defendants.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jul. 12, 1917. Frank L. Crosby, clerk. By F. M. Harshberger, deputy.

63 United States District Court, Western District of Washington, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF, *v.* EDWARD M. COMYNS AND CHARLES L. BYRON, defendants.	No. 2217.

Order allowing writ of error.

Now on this 12th day of July, 1917, came the plaintiff and filed herein and presented to the court its petition praying for the allowance of a writ of error intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Supreme Court, and that such other and further proceedings may be had as may be proper in the premises.

Now therefore, upon consideration of said petition and being fully advised in the premises, the court does hereby allow the said writ of error.

And it is further ordered that the transcript of the record and proceedings and papers upon the judgment herein duly authenticated be sent to the United States Supreme Court and that such other and further proceedings be had as may be proper in the premises.

EDWARD E. CUSHMAN,
United States District Judge.

64 Service of the within order by delivery of a copy to the undersigned is hereby acknowledged this 12 day of July, 1917.

P. V. DAVIS,
Attorney for Defendants.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jul. 12, 1917. Frank L. Crosby, clerk. By F. M. Harshberger, deputy.

65 United States District Court, Western District of Washington, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
v.
EDWARD M. COMYNS AND CHARLES L. BYRON, DEFENDANTS. } No. 2217.

Citation to defendants in error.

THE UNITED STATES OF AMERICA, *ss:*

To Edward M. Comyns and Charles L. Byron, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, on the eleventh day of August, 1917, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein the United States of America is plaintiff and you are the defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Given under my hand at the city of Tacoma, in the division and district above named, this 12th day of July, in the year of our Lord one thousand nine hundred and seventeen.

EDWARD E. CUSHMAN,
United States District Judge.

66 Service of the foregoing citation and receipt of a copy thereof is hereby admitted this 12 day of July, 1917.

P. V. DAVIS,
Attorney for Defendants in Error.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jul. 12, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

67 In the United States Supreme Court.

UNITED STATES OF AMERICA, PLAINTIFF in error,
v.
EDWARD M. COMYNS AND CHARLES L. BYRON, defendants in error. } No. —.

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America: To the Honorable Judge of the District Court of the United States for the Western District of Washington, greetings:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said district court before you, between the United States of America, as plaintiff, and Edward M. Comyns and Charles L. Byron, as defendants, a manifest error hath happened, to the great damage of the said plaintiff as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at the city of Washington, District of Columbia,
68 on the eleventh day of August, 1917, next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness: The Honorable Edward D. White, Chief Justice of the United States of America, this 12th day of July, in the year of our Lord, one thousand nine hundred and seventeen.

[SEAL.] FRANK L. CROSBY,
Clerk of the District Court of the United States for the Western District of Washington.
By F. M. HARSBERGER,
Deputy Clerk.

Allowed by:

EDWARD E. CUSHMAN,
United States District Judge, Holding the District Court of the United States for the Western District of Washington.

Service of the within writ by delivery of a copy to the undersigned is hereby acknowledged this 12 day of July, 1917.

P. V. DAVIS,
Attorney for Defendants in Error.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jul. 12, 1917. Frank L. Crosby, clerk. By F. M. Harshberger, deputy.

69 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I, Frank L. Crosby, clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing is a true and correct copy of the record and proceedings in the case of the United States of America, plaintiff, versus Edward M. Comyns and Carlos L. Byron, defendants, as required by præcipe and stipulation of counsel filed and shown herein and as the originals thereto appear on file and of record in my office in said district at Tacoma, and that the same constitutes my return on the annexed writ of error herein.

I further certify and return that I hereto attach and herewith transmit the original writ of error and the original citation to defendants in error herein.

I further certify that the following is a full, true, and correct statement of all expenses, costs, fees, and charges incurred in my office by and on behalf of the plaintiff in error herein for making the record, certificate, and return to the Supreme Court of the United States in the above-entitled cause, which amounts will be included in my quarterly account against the United States, to wit:

Clerk's fees (sec. 828, R. S. U. S.) for making record, 170 folios at 15¢ each	$25.50
Certificate of clerk to transcript, 2 folios at 15¢ each	.30
Seal to said certificate	.20

Attest my hand and the seal of said District Court at Tacoma, in said district, this 2nd day of August, A. D. 1917.

[SEAL.] FRANK L. CROSBY, *Clerk.*
By F. M. HARSHBERGER, *Deputy Clerk.*

70 In the United States Supreme Court.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
v.
EDWARD M. COMYNS AND CHARLES L. BYRON, DEFENDANTS in error. } No.—.

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America: To the Honorable Judge of the District Court of the United States for the Western District of Washington, Greetings:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, between the United States of America, as plaintiff, and Edward M. Comyns and Charles L. Byron, as defendants, a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at the city of Washington,
71 District of Columbia, on the eleventh day of August, 1917, next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness: The Honorable Edward D. White, Chief Justice of the United States of America, this 12th day of July, in the year of our Lord, one thousand nine hundred and seventeen.

[SEAL.] FRANK L. CROSBY,
Clerk of the District Court of the United States,
for the Western District of Washington.
By F. M. HARSHBERGER,
Deputy Clerk.

Allowed by:

EDWARD E. CUSHMAN,

United States District Judge, holding the District Court of the United States for the Western District of Washington.

72 No. —. In the Supreme Court of the United States. United States of America, plaintiff in error, v. Edward M. Comyns and Charles L. Byron, defendants in error. Writ of error.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jul. 12, 1917. Frank L. Crosby, clerk. By F. M. Harshberger, deputy.

Service of the within writ by delivery of a copy to the undersigned is hereby acknowledged this 12 day of July, 1917.

P. V. DAVIS,
Attorney for Defendants in Error.

73 United States District Court, Western District of Washington, Southern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
v.
EDWARD M. COMYNS AND CHARLES L. BYRON, defendants. } No. 2217.

Citation to defendants in error.

THE UNITED STATES OF AMERICA, *ss:*
To Edward M. Comyns and Charles L. Byron, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, on the eleventh day of August, 1917, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein the United States of America is plaintiff and you are the defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Given under my hand at the city of Tacoma, in the division and district above named, this 12th day of July, in the year of our Lord one thousand nine hundred and seventeen.

EDWARD E. CUSHMAN,
United States District Judge.

74 No. 2217.—In the District Court of the United States for the Western District of Washington, Southern Division. United States of America, plaintiff, v. Edward M. Comyns and Charles L. Byron, defendants. Citation to defendants in error.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division, Jul. 12, 1917. Frank L. Crosby, clerk. By F. M. Harshberger, deputy.

Service of the foregoing citation and receipt of a copy thereof is hereby admitted this 12 day of July, 1917.

P. V. DAVIS,
Attorney for Defendants in Error.

(Indorsed on cover:) File No. 26080. W. Washington, D. C. U. S. Term No. 613. The United States of America, plaintiff in error, vs. Edward M. Comyns and Charles L. Byron. Filed August 10th, 1917. File No. 26080.

○

In the Supreme Court of the United States

OCTOBER TERM, 1917.

The UNITED STATES OF AMERICA, PLAINTIFF in error, *v.* EDWARD M. COMYNS AND CARLOS L. BYRON.	No. 613.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and, in accordance with the provisions of the Criminal Appeals Act, 34 Stat. 1246, moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

Defendants were indicted in the District Court of the United States for the Western District of Washington for using the mails for the purpose of executing a scheme to defraud which they had theretofore devised, in violation of section 215 of the Criminal Code. A demurrer to the indictment was sustained, the District Court holding in substance and effect that in setting out a scheme for obtaining money by false

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promises through the use of the mails in an indictment under section 215 it must be alleged that it is the purpose and intent of defendants in making the alleged false promises to thereby induce their victims to either enter into the alleged fraudulent scheme with the defendants or to part with their money.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

MARCH, 1918.

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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE UNITED STATES, plaintiff in error,
v.
EDWARD M. COMYNS and CARLOS L. BYRON.
} No. 235.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The writ of error in this case (R. 41) is under the Criminal Appeals Act of March 2, 1907, chapter 2564, 34 Stat. 1246, and brings up for review a judgment (R. 31) of the District Court for the Western District of the State of Washington sustaining a demurrer (R. 22, 25) to an indictment (R. 2) under section 215 of the Penal Code for the offense of causing a letter to be deposited in a United States post office in execution of a scheme to defraud.

The indictment contains four counts. The first count charges that prior to December 10, 1914,

within the jurisdiction of the court, the defendants devised a scheme (R. 2)—

> to defraud one Carl S. Baker, Charles H. Parent, Oscar H. Mack, Harry N. McDonald, Leo S. McDonald, A. R. McDonald, Francis M. McPherson, William F. Ulrich, Persis G. Ulrich, and divers other persons to the grand jurors unknown; that is to say, to obtain from them and each of them their moneys and property by means of divers false and fraudulent pretenses and representations, and to induce the persons intended to be defrauded to give to the said defendants, and to each of them, such moneys and property, with the intent on the part of the said defendants, and each of them, to convert the same to their own use, and to the use of each of them.

The scheme was then more particularly charged as follows (R. 3):

> That Edward M. Comyns and Carlos L. Byron, and each of them, should represent that said Edward M. Comyns was a lawyer admitted to practice before the United States Land Office, and that said Carlos L. Byron was a locator and that they could locate said parties and secure for them the preference right to purchase from the United States of America under the timber and stone act of June 3, 1878, certain land within the Western District of Washington for the sum of two and 50/100 dollars ($2.50) per acre, by filing an application to purchase under said act, and that the said property was worth more than that sum; and that they would agree with said

parties to be defrauded that they would charge from one hundred dollars to one thousand dollars a piece as a fee for locating said parties and securing for them title to said land above mentioned, and that a part of said fee hereinafter called the initial fee should be paid at the time of their making the agreement and the balance of said fee should be paid at the time said parties to be defrauded secured their title to said land, and that if said parties to be defrauded failed to get title to said land, then the said defendants and each of them would refund to said parties to be defrauded the amount of the fee already so paid to said defendants; whereas, as a matter of fact, as the defendants and each of them well know, the said defendants could not locate said parties and could not secure for them the preference right to purchase from the United States of America the land above mentioned for the sum of two and 50/100 dollars ($2.50) per acre by filing said application; and the agreement, as to the land, to be performed in consideration of the payment of said fee was for the purpose of securing the payment of said initial fee and for the purpose of delaying the said parties to be defrauded from demanding the repayment of said initial fee and for the purpose of preventing said parties to be defrauded from discovering the fact that they had been defrauded and disclosing said fact to others, and said defendants and each of them intended to appropriate to their own use and the use of each of said defendants said initial fee, and did not intend to refund said initial fee or any part

> thereof if said parties to be defrauded failed to get title to said land in accordance with said agreement.

It was further charged that the scheme was to be carried out (R. 8):

> By getting the parties to be defrauded to go before W. A. Westover, then and there being a United States commissioner, for the purpose of certifying to said application, and for the further purpose of having said W. A. Westover forward by United States mail said letter, application, and money order to the United States land office at Vancouver, Washington.

In execution of this scheme it was charged that on December 10, 1914, within the jurisdiction of the court, the defendants caused to be placed in the United States post office at Chehalis, Wash., a letter signed by Westover, the United States commissioner, addressed to the register of the United States land office at Vancouver, Wash., inclosing a timber and stone application by Francis M. McPherson, sworn to before Westover, for a quarter section of land within the Vancouver land district. (R. 4.) The letter of Westover and the sworn application were set out in full (R. 4–8).

The other counts are the same as the first, except that the second relates to an application by Persis G. Ulrich, mailed December 10, 1914 (R. 9); the third to an application by Charles H. Parent, mailed March 22, 1915 (R. 13); and the fourth to an application by Oscar H. Mack, mailed April 4, 1915 (R. 18).

The defendants demurred to the indictment on the following grounds (R. 22):

1. That the above entitled court is without jurisdiction of the subject matter herein.

2. That said indictment and each and every count thereof fails to state facts sufficient to charge a crime against said defendants or either of them.

3. That said indictment and each and every count thereof is not specific enough and is too vague, indefinite, ambiguous, and uncertain to charge any facts sufficient to constitute a crime or offense.

4. That said indictment and each and every count thereof is insufficient in law to charge any offense against the defendants or either of them.

5. That said indictment was not brought within the time required by law.

Upon the hearing of this demurrer, as stated in a bill of exceptions (R. 32)—

> it was determined that the demurrer would be overruled upon the condition that the plaintiff, by a bill of particulars, show what it was which rendered it impossible for the defendants to make good the representations and promises contemplated in the alleged scheme to defraud.
>
> The plaintiff conformed to the order of the court by filing a bill of particulars, and before the hearing the bill of particulars was withdrawn and made more full by an amended bill of particulars.

The substance of the bill of particulars was stated by the court in its opinion as follows (R. 28):

> The district attorney has filed a bill of particulars setting out that timber and stone filings would have conflicted with lists of State selections which, it is admitted, were filed for lands in lieu of sections 16 and 36, included, since the admission of the State of Washington, in certain forest reservations; that the representations were further false in that the applications for purchase under the timber and stone act, the subject of the contemplated representations, were not as required by the rules of the General Land Office requiring the lands to be examined in person by the applicant and the application to allege that the statements concerning the character of the land were made from the applicant's personal knowledge.

Thereupon the defendants renewed their demurrer to the indictment "as aided by said bill of particulars," upon the identical grounds stated in the original demurrer. (R. 25–26.)

The defendant also filed a motion to strike the bill of particulars (R. 26), which the court treated "as a petition to reargue and rehear the demurrer to the indictment as amplified by the bill of particulars." (R. 28.) The court then considered the matters set forth in the bill of particulars, and held that they were not sufficient to show that it was "impossible for the defendants to make good the representations and promises contemplated in the alleged scheme to defraud." (R. 28.)

Upon this rehearing the court also held the indictment demurrable, aside from the bill of particulars (R. 29) upon the ground that (R. 30)—

> there is no allegation that it was the purpose and intent of the defendants in making the alleged false representations and promises to thereby induce their victims to either enter into the alleged agreement with the defendants or part with their money.

Jurisdiction of This Court.

The criminal appeals act of March 2, 1907, chapter 2564, 34 Stat. 1246, provides:

> That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to-wit:
>
> From a decision or judgment quashing, setting aside, or sustaining a demurrer to any indictment or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded. * * *

The indictment in this case is founded on section 215 of the Penal Code, which provides that:

> Whoever, having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice, or attempting so to do, place, or cause to be

> placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office or station thereof or street or other letter box of the United States or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement shall be fined not more than one thousand dollars or imprisoned not more than five years, or both.

The jurisdiction of this court depends upon whether the court construed section 215 of the Penal Code in ruling that certain allegations were necessary to charge the offense of using the mails in execution of a scheme to defraud. The indictment obviously attempts to charge an offense under section 215 of the Penal Code, and it was so indorsed. (R. 22.) It matters not that the court did not mention this statute in its ruling, or that its attention was diverted to other statutes and departmental regulations. It was enough for the court to hold, as it did, that the indictment did not charge any offense. *United States* v. *Nixon*, 235 U. S., 231, 235–236, and cases cited.

The rulings of the District Court do not present mere questions of defect as a matter of pleading, as in *United States* v. *Carter*, 231 U. S. 492, 493, and the cases there cited. Leaving out of view the ruling on the bill of particulars—which neither adds to nor takes from the indictment for the purpose of a demurrer (*Dunlop* v. *United States*, 165 U. S. 486, 491)—the court held that the alleged scheme was not fraudulent because it was not charged that the agreements to locate public land which the scheme contemplated were impossible of fulfillment, and also because it was not charged that the purpose of such agreements was to induce the victims to enter into them or part with their money. These were rulings upon what the statute required to make out the offense. The result of the rulings was that the court sustained a demurrer on the ground that the alleged fraudulent scheme was legitimate business, as in *United States* v. *New South Farm*, 241 U. S. 64, 70, or "that something more was necessary to an offense under section 215 than the averment of the scheme and its attempted execution in the manner stated," as in *United States* v. *Young*, 232 U. S. 155, 161. It has also been held that a judgment sustaining a demurrer on the ground that a certain allegation is necessary to charge an offense confers jurisdiction as a construction of the statute, although the ruling also involves a construction of the indictment which is beyond review. *United States* v. *Miller*, 223 U. S. 599, 602; *United States* v. *Heinze*, 218 U. S. 532, 540.

Specifications of Error.

The numerous errors alleged in the assignment (R. 34) may be reduced to two, viz:

1. Error in ruling that the facts alleged in the indictment do not constitute an offense under section 215 of the Penal Code.

2. Error in ruling that the facts stated in the indictment, as amplified by the bill of particulars, do not constitute an offense under section 215 of the Penal Code.

ARGUMENT.

I.

The Indictment Apart from the Bill of Particulars.

The district court found no fault with that part of the indictment which charged the use of the mails for the purpose of executing or attempting to execute the scheme alleged. The scheme itself was held not to be such as is contemplated by section 215 of the Penal Code. In substance the alleged scheme was that the defendants would represent to and agree with their intended victims that they could secure for them from the United States through applications under the Timber and Stone Act of June 3, 1878, certain lands in the State of Washington at $2.50 per acre, which were worth more, in consideration of a fee of from $100 to $1,000 a piece, a portion of which as an initial fee to be paid in advance and to be refunded in case of failure to get title, the defendants knowing that they could not get title as proposed, but intending to

appropriate the initial fee to their own use and not intending to refund it or any part of it "if said parties to be defrauded failed to get title to said land in accordance with said agreement." (R. 3.)

The effect of requiring the bill of particulars as a condition of overruling the demurrer, and then of sustaining the demurrer upon the facts shown in the bill of particulars, was to hold that the alleged scheme was not within section 215 of the Penal Code for want of an allegation of fact in the indictment showing as a matter of law that it was impossible for the defendants to get title for their victims to the lands applied for under the Timber and Stone Act. We shall contend hereafter that, upon the admitted facts, it was impossible to get title as proposed in the alleged scheme. But conceding that point for the present, we yet contend that it is immaterial, since the main purpose of the defendants was to secure the initial fee under a promise to refund it in case of failure to get title, but with the intention to appropriate it to their own use whether the applicants got title or not.

The words of the indictment are (R. 3):

> And said defendants and each of them intended to appropriate to their own use and the use of each of said defendants said initial fee, and did not intend to refund said initial fee or any part thereof if said parties to be defrauded failed to get title to said land in accordance with said agreement.

The court also sustained the demurrer without reference to the bill of particulars, but expressly aside from it (R. 29), upon the ground that (R. 30)—

> there is no allegation that it was the purpose and intent of the defendants in making the alleged false representations and promises to thereby induce their victims to either enter into the alleged agreement with the defendants or part with their money.

There was in fact such an allegation just preceding those quoted by the court. Referring to nine intended victims by name and to others unknown, the scheme was stated in general to be (R. 3)—

> to obtain from them and each of them their moneys and property by means of divers false and fraudulent pretenses and representations, and to induce the persons intended to be defrauded to give to the said defendants, and to each of them, such moneys and property, with the intent on the part of the said defendants, and each of them, to convert the same to their own use and to the use of each of them.

But accepting the court's view that the precise allegation deemed essential is not made by the language quoted, yet the scheme was one plainly devised to commit fraud, in that its purpose was to obtain the initial fee under a promise to refund it, upon failure to get title, but with the intention to keep it at all events.

The fundamental error of the District Court was in regarding the alleged scheme as "one, in effect, for obtaining money by false promises," requiring to

sustain it misrepresentation as to existing facts, as distinguished from a mere promise as to the future. (R. 30.) Such is not, however, the requirement of section 215 of the Penal Code.

This precise point was decided in *Durland* v. *United States*, 161 U. S. 306, which was a case of conviction for using the mails in execution of a scheme to defraud. Counsel for the defendant contended (p. 312)—

> that the statute reaches only such cases as, at common law, would come within the definition of "false pretenses," in order to make out which there must be a misrepresentation as to some existing fact and not a mere promise as to the future.

But the court answered (p. 313):

> We can not agree with counsel. The statute is broader than is claimed. Its letter shows this: "Any scheme or artifice to defraud." Some schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud. Punishment because of the fraudulent purpose is no new thing.
> * * *
> But beyond the letter of the statute is the evil sought to be remedied, which is always significant in determining the meaning. It is common knowledge that nothing is more alluring than the expectation of receiving large returns on small investments. Eagerness to take the chances of large gains lies at the foundation of all lottery schemes, and,

> even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than is parted with appeals to the cupidity of all.
>
> In the light of this the statute must be read, and so read it includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose.

To similar effect is *United States* v. *Young*, 232 U. S. 155, 161–162.

In *Horn* v. *United States*, 182 Fed. 721, 727 (C. C. A., eighth circuit, certiorari denied, 219 U. S. 585), the court said:

> While the formation of some scheme or artifice to defraud is an essential element of the offense, the gist of the offense is the use or attempted use of the United States mails for the forbidden purpose. It is only necessary, therefore, to charge the scheme with such particularity as will enable the accused to know what is intended, and to apprise him of what he will be required to meet upon the trial; and if it is distinctly alleged that the United States mails are to be used, or are intended to be used, in consummating such scheme, that is sufficient. *Durland* v. *United States*, 161 U. S. 306–315, 16 Sup. Ct. 508, 40 L. Ed. 709; *Brooks* v. *United States*, 76 C. C. A. 581, 146 Fed. 223–227; *Lemon* v. *United States*, 90 C. C. A. 617, 164 Fed. 953–957; *Ewing* v. *United States*, 69 C. C. A. 61, 136 Fed. 53–56.

And again (p. 727):

> Whether or not the defendants in good faith believed, or had reasonable grounds to believe, that the alleged statements or representations to be made by them were true, is matter of defense and not necessary to be negatived in the indictment. *Lemon* v. *United States*, 164 Fed. 953, 90 C. C. A. 617; *Ewing* v. *United States*, 136 Fed. 53, 69 C. C. A. 61; *State* v. *Williams*, 70 Iowa, 52, 29 N. W. 801; 1 Bishop's New Cr. Pro. secs. 326–513.

In *Preeman* v. *United States*, 244 Fed. 1, 7–8 (C. C. A., seventh circuit, certiorari denied, 245 U. S. 654), the court said:

> This indictment charges defendants with using the mails in execution of a scheme or artifice to defraud which they had devised; the conspiracy counts charging a conspiracy to so use the mails. Where the charge is that of obtaining property by fraud, the material elements of the fraudulent scheme whereby the property was obtained should be set forth in the indictment, but here it is necessary only to set forth generally the scheme or artifice which the defendants devised, and to charge the use of the mails in execution of the scheme. *Durland* v. *United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709; *Bettman* v. *United States*, 224 Fed. 819, 140 C. C. A., 265; *Farmer* v. *United States*, 223 Fed. 903, 139 C. C. A. 341; *Gourdain* v. *United States*. 154 Fed. 453, 83 C. C. A. 309. And the scheme itself is not required to be charged with the detail and particularity necessary in

an indictment for the specific offense of obtaining property through false representations. *Bettman* v. *United States, supra; Emanuel* v. *United States,* 196 Fed. 317, 116 C. C. A. 137; *Blanton* v. *United States,* 213 Fed. 320, 130 C. C. A. 22, Ann. Cas. 1914D, 1238; *Foster* v. *United States,* 178 Fed. 165, 101 C. C. A. 485.

II.

The Indictment as Aided by the Bill of Particulars.

Assuming that the facts shown in the bill of particulars are open to consideration as a part of the indictment, because the court so considered them without objection (see *Dunlop* v. *United States,* 165 U. S. 486, 491; *United States* v. *Adams Exp. Co.,* 119 Fed. 240, 241–242), and assuming also, without conceding, that it was necessary to show the impossibility of obtaining title under the timber and stone act to the lands contemplated in the alleged scheme to defraud, we maintain that those facts do show such impossibility.

It was shown (R. 44) that the lands to be applied for under the timber and stone act could not be secured (1) because they were covered by a list of selections made by the State of Washington in lieu of school sections 16 and 36 which had been included since the admission of the State in forest reservations; and (2) because the statements to be made in the applications as to the character of the land were to be on information and belief and not from the applicant's personal knowledge after examination of the land as required by the rules of the General Land Office.

The court held that the list of selections, as well as the rules of the General Land Office, were unauthorized and void. We maintain that both were authorized and valid.

(*a*) *Validity of the Lieu Selections.*

The first point is settled by the decision in *California* v. *Deseret Water, etc., Co.*, 243 U. S. 415. In that case the main question was whether the State of California had title to a school section which was included in a forest reservation after the school grant took effect, but which the State had surrendered to the United States as a base for lieu selections under sections 2275 and 2276 of the Revised Statutes as amended by the act of February 28, 1891, 26 Stat. 796, 797. This question depended upon whether the statute referred to authorized the lieu selections, and it was held that it did. Referring to a controlling clause of the statute, the court said (p. 420):

> This language, while not as clear as it might be, operates, as we interpret it, to give to the State a right to waive its right to such lands where, as in this case, the same are included in a forest reservation after survey—that is, after the title vests in the State.

In the case at bar the District Court sought to distinguish the *Deseret* case on the ground that (R. 28)—

> sections 2275 and 2276, R. S., amended by the law of 1891, were adopted after California became a State and after that State acquired its interest in its school lands, and such sections of the Revised Statutes being a general law would apply to school-land grants theretofore

> made, whereas the grant made by the enabling act of 1889 to the State of Washington was a later and special act making special provisions concerning the lands granted, among others being, "and such lands shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be preserved for school purposes only."

It is difficult to understand what is meant by this statement. If it means that the amendment of 1891 does not apply to Washington because the school grant to that State in 1889 was "a later and special act," the proposition is impossible on its face. If it means that sections 2275 and 2276, without the amendment of 1891, do not apply to Washington, the answer is that the clause which was held in the *Deseret* case to authorize a State to select lieu lands in exchange for school sections in a forest reservation is not in sections 2275 and 2276 of the Revised Statutes, but only in the amendment of 1891. 243 U. S. 420. Moreover it was settled by the decision in *United States* v. *Sweet*, 245 U. S. 563, 572, 573, that the lieu-land provision, as amended in 1891, applies to subsequent as well as prior school grants. It was applied in that case to the school grant made to the State of Utah on its admission to the Union in 1894. The terms of the school grant to Utah by the act of July 16, 1894, 28 Stat. 107, secs. 6, 10, are not substantially different from those of the school grant to Washington by the act of February 22, 1889, 25 Stat. 676, secs. 10, 11.

The decision in *State* v *Whitney*, 66 Wash. 473, upon which the District Court relied, does not appear to touch the question of the right of the State to relinquish its title to school lands in a forest reservation and select other lands in lieu thereof under the act of 1891. The land in controversy in that case was a part of a school section, not a lieu selection, and the State had not relinquished it to the United States, but was claiming it against a homestead settler. The sole question was whether the land was excepted from the grant by virtue of a homestead settlement made after the grant but before survey, and the State prevailed.

(*b*) *Validity of the Land Office Regulation.*

The second point has been equally foreclosed. It is whether the Land Department had authority to require, in applications under the timber and stone act of June 3, 1878, c. 151, 20 Stat. 89, that the statement respecting the character and condition of the land be made upon the personal knowledge of the applicant, save in the particulars which the act declares may be stated upon belief.

Section 1 of the act provides for the sale in 160-acre tracts, at $2.50 per acre, of public lands "valuable chiefly for timber, but unfit for cultivation"; and that "lands valuable chiefly for stone may be sold on the same terms as timber lands."

Section 2 reads as follows:

> SEC. 2. That any person desiring to avail himself of the provisions of this act shall file

with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated, and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

Section 3 provides for publication of notice of the application for 60 days, final proof by satisfactory evidence of the character and condition of the land, the issuance of patents after such proof and payment of the purchase money and fees, and that—

> Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

Regulations prescribed by circular of instructions to registers and receivers dated May 21, 1887, 6 L. D. 114, 115, provided:

> The sworn statement before the register and receiver required as above (sec. 2 of the act) must be made upon the personal knowledge of applicant, except in the particulars in which the statute provides that the affidavit may be made upon information and belief.

A form attached to the circular contained the clause (p. 117):

> that I have personally examined said land and from my personal knowledge state that said land is unfit for cultivation and valuable chiefly for its ———; that it is uninhabited; that it contains no mining or other improvements; nor, as I verily believe, any valuable deposit of gold, silver, cinnabar, copper, or coal.

The Land Department has uniformly insisted upon the enforcement of this regulation and refused to change it because of the decision in *Hoover* v. *Salling*,

110 Fed. 43, that it was unauthorized. *Grace P. Featherstone*, 32 L. D. 631, 632, and cases cited.

In *Ness* v. *Fisher*, 223 U. S. 683, one whose application had been rejected for failure to comply with this regulation sued for a writ of mandamus to compel acceptance of his application on the ground that the requirement was unauthorized by the statute. It was held that, though there might be room for a difference of opinion as to the true construction of the statute, that of the department had been adopted in the exercise of judgment and discretion committed to it by the law, and the writ was denied. Though the precise point was not decided, because that was unnecessary, it was pointed out that the requirement was founded on a construction of the statute which had long prevailed in the department, had been approved in *United States* v. *Wood*, 70 Fed. 485, and *Hoover* v. *Salling*, 102 Fed. 716, and sustained by the Court of Appeals of the District of Columbia in that case.

The opinion of the Court of Appeals of the District in the same case, reported as *Ballinger* v. *Ness*, 33 App. D. C. 302, leaves little to be desired. The fallacy of the reasoning in *Hoover* v. *Salling*, 110 Fed. 43, upon which the court relied in the case at bar, is pointed out (p. 311), and the propriety of the regulation under the statute is thus stated (p. 308):

> The necessary facts that the land shall be unoccupied, unfit for cultivation, and chiefly valuable for timber and stone, are capable of exact and certain statement after its inspection.

Whether there may be mineral deposits in the land is a fact that the average applicant would not, ordinarily, be able to determine by going upon the land and making careful examination. Hence, while the first statement must be positive, as of actual knowledge, the second may be upon belief merely.

While it is true, as stated in a case relied on by the appellee, and which will be reviewed later, that the statute does not expressly provide that the verification of the application shall be upon personal knowledge only, yet that intention seems to be clearly implied. If not so intended, why the insertion of the provision that the fact as to the existence of mineral deposits may be stated upon belief? This was wholly unnecessary if it had been intended that the preceding facts might be stated as a matter of belief also. Moreover, the statute requires that the verification shall be by the applicant in person. It can not be made in his name by an agent or attorney. *Martin* v. *Martin & B. Co.*, 27 App. D. C. 59, 62, 7 & A. & E. Ann. Cas. 47. This requirement would be practically nugatory if the affidavit of necessary facts could be made solely upon information derived from an agent. That it was the intention that the necessary positive statement of facts should be upon the personal knowledge of the applicant, necessarily to be acquired by examining the land, seems to be confirmed by the last clause of sec. 2, which declares that, if any person shall swear falsely in the premises, he shall be subject to all the pains and penalties

> of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same. If the entire affidavit can be made upon information and belief, it is difficult to see how the pains and penalties of perjury could be visited upon the applicant. If perjury could be maintained at all upon such an affidavit, the question of guilt would depend not upon the falsity of the statement of the facts as to occupancy and unfitness for cultivation, but upon the falsity of the applicant's belief in the truth of the representations made to him in this regard by his agent or representative. It would be practically impossible to establish willful and corrupt false swearing in such a case.

These authorities certainly show that the Land Department can not be compelled to accept an application under the timber and stone act which does not comply with the regulation in question. It follows that the undertaking of the defendants to have such applications accepted was impossible of fulfillment. This should be an end of the matter, regardless of whether the crime of perjury could be predicated on a false affidavit made in the form prescribed by the regulations. But even this question is foreclosed by the decision in *United States* v. *Morehead*, 243 U. S. 607. That case involved an indictment for a conspiracy to commit subornation of perjury by inducing applicants to make affidavits in support of soldiers' declaratory statements, which affidavits were not required by the law, but only by a regulation of the Land Department. The question was there, as

it would be here if this were a prosecution based on the regulation in question, whether the regulation was appropriate to the enforcement of the statute. The regulation was held to be appropriate and valid, and the indictment was sustained. The court said (p. 613):

> Defendant contends that this regulation, which has been enforced continuously for nearly thirty-five years, is invalid. Since the Land Department is expressly charged with the duty of enforcing the public-land laws by appropriate regulations and the regulations in question was duly promulgated, the assertion of its invalidity must be predicated either upon its being inconsistent with the statutes or upon its being in itself unreasonable or inappropriate. That the requirement of the soldier's affidavit to the facts essential to the existence of any right of the applicant under the law is both reasonable and appropriate can scarcely be doubted. *United States* v. *Smull*, 236 U. S. 405, 411; *United States* v. *Bailey*, 9 Pet. 238, 255. But defendant urges that the regulation is inconsistent with the statute in that it adds to the requirements of the statute still another condition to be performed before the soldier can acquire his homestead; and hence is legislation, not regulation. But the regulation does not add a new requirement in exacting the affidavit, as in *Williamson* v. *United States*, 207 U. S. 425, 458–462. It merely demands appropriate evidence that the proceeding is initiated—as the statute requires it must be throughout con-

ducted—in good faith for the single purpose of acquiring a homestead.

CONCLUSION.

The judgment of the District Court should be reversed.

Respectfully submitted.

FRANCIS J. KEARFUL,
Assistant Attorney General.

OCTOBER, 1918.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 235.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

EDWARD M. COMYNS AND CARLOS L. BYRON.

BRIEF FOR THE DEFENDANTS IN ERROR.

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OCTOBER TERM, 1918.

No. 235.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

EDWARD M. COMYNS AND CARLOS L. BYRON.

BRIEF FOR THE DEFENDANTS IN ERROR.

Statement.

The defendants in error were indicted in the District Court for the Western District of Washington upon the charge of using the United States mail in furtherance of a scheme to defraud. The case was determined in the lower court upon a demurrer to the indictment, or, more precisely, to the indictment as supplemented by a bill of particulars. The demurrer was sustained, and the record comes into this Court upon a writ of error sued out by the Government.

The indictment alleges that the defendants, having devised a scheme to defraud certain persons, who are named, by inducing them through certain false representations to pay money to the defendants, deposited certain papers in the mail in the prosecution of that scheme. The fraudulent scheme consisted in representing that Comyns, one of the defendants, was a lawyer qualified to practise in the United States Land Office; that Byron, the other defendant, was what is called in the indictment a locator, a term which is not defined and the meaning of which is hardly the subject of judicial notice; that the defendants were able to procure for the persons to be defrauded the right severally to make entries of certain tracts of public land under the Timber and Stone Land Act of 1878, and would do so in consideration of certain fees to be paid to the defendants by the other persons; that the lands to be entered were worth more than the price which would have to be paid for them; and the defendants were to promise that they would procure the entries to be made upon the payment by the other persons of the fees specified (R., 2).

It is not averred that Comyns was not, as was to be represented, a duly qualified attorney, or that Bryon was not a locator and entirely competent in whatever capacities that term may imply. Neither is it suggested that the tracts to be applied for did not exist, or were not public lands, or were not subject to entry under the Timber and Stone Land Act, or that there was any impediment to the making of the entries proposed. Nor is it said that the lands were not, as represented, worth more than the entrymen would have to pay for them.

The single element of deceit in the alleged scheme set forth was the alleged fact that the defendants could not

procure the proposed entries to be made, which inability of the defendants was well known to them.

The indictment does not state any facts which rendered the defendants unable to procure the entries, and it does not pretend to show any reason why their representations of that ability to do so was false or fraudulent. The pleading stands upon the simple averment that the defendants could not secure the lands for the persons to be defrauded, and that the defendants knew that fact.

The indictment was, therefore, substantially defective for the reason, among others of more distinctly technical nature, that the fact essential to the fraudulent character of the scheme, namely, the inability of the defendants to perform their promises, was not shown by the averment of any facts which constitute, demonstrate or explain such inability. The impossibility of securing the proposed entries is manifestly a mere matter of law, and the allegation that the entries could not be made is nothing more than a legal conclusion. As the facts supposed to constitute the impossibility are not stated, the Court is unable to judge whether or not the conclusion drawn is correct, and the defendants could not plead intelligently to the indictment, being unable either to admit or to traverse the unspecified and to them unknown facts which may or may not have rendered the entries impossible.

Upon this ground, substantially, the defendants demurred to the indictment (R., 22). The Court was apparently of opinion that the demurrer was, for the reason just suggested, well taken; but the demurrer was overruled upon condition that the Government furnish a bill of particulars showing reasons for the averment that the lands could not be entered (R., 23).

Thereupon the District Attorney filed a bill of particulars, and afterwards an amended bill of particulars (R., 23, 24). In these documents the prosecution undertakes to supply the deficient averments of the indictment by specifying facts which made the proposed entries impossible.

The manner in which the bill of particulars professes to amend the indictment, and the technical sufficiency of the amendatory averments, will be the subject of more particular notice at a later point. For the present, it suffices to say that the Court below, by a very indulgent reading of the bill, understood it to assign, although certainly it did not aver, these facts as grounds for the averment of the indictment that the proposed entries were impossible.

That some of the applications which the defendants filed by way of initiating the claims of their clients to the lands sought to be entered were defective in that the affidavits filed with the applications did not show that the applicants had made personal examination of the tracts sought to be entered, but alleged the timbered character of the land upon information and belief; and

That some of the proposed entries were in conflict with certain selections of indemnity school lands.

To the indictment, as thus supplemented by the bill of particulars, the defendants again demurred (R., 25).

By a document styled a bill of exceptions (R., 31), drawn up and filed after the argument on this demurrer, it appears that at the hearing the defendants admitted by stipulation that certain of the entries proposed to be made "were in conflict with State selections which were filed for lands in lieu of such parts of sections sixteen and thirty-six as were included since the admission of

the State of Washington in certain forest reservations made by the United States" (R., 33).

Taking together the indictment, the bill of particulars and the stipulation, the Court below seems to have treated the record as presenting the question whether the proposed entries could, as a matter of law, have been made. The opinion filed (R., 28) holds that the applications filed in the land office by the defendants were sufficient and valid, and that the alleged indemnity selections were invalid because the State was not entitled to indemnity for school lands which, after vesting in the State, were surrounded by Federal forest reservations.

Upon these holdings, and upon a defect of technical character in the indictment, the demurrer was sustained.

It will hereinafter be submitted that, if this record properly presents for adjudication the questions decided upon demurrer, the District Court was correct in its opinion upon the points assumed to be presented. But, before asking consideration here of the questions decided below, the attention of this Court will be solicited to certain defects in the indictments which, it is believed, render it necessary to sustain the demurrer without regard to the soundness of the ruling below upon the questions of substantive law there examined.

ARGUMENT.

I.

General Requisites of the Indictment.

With respect to the requisites of an indictment such as the present is intended to be, a few general propositions laid down by this Court may be premised.

An indictment must specify and aver every fact necessary to constitute the offense intended to be charged;

otherwise the pleading is bad on general demurrer, on motion in arrest of judgment, and on error.

United States v. Mann, 95 U. S., 580;
Pettibone v. United States, 148 U. S., 197.

Where the indictment is drawn upon a statute which describes the offense in general words, it is not sufficient to charge the offense in the language of the statute, but the particular facts supposed to constitute the offense generally designated by the statute must be severally and specifically stated.

United States v. Simmons, 96 U. S., 360.

This may sometimes necessitate even the averment of a matter not within the express content of the statute, if such matter be clearly implied by the enactment or by the analogies of general law on the same subject: as where a statute did not enumerate guilty knowledge as one of the elements of the offense, but such knowledge was, upon general principles, held to be essential to the offense.

United States v. Carll, 105 U. S., 611.

Especially where a statute, or an indictment following the statute or attempting to state the statutory offense, relates to a matter of law or to one embodying a legal concept, it is not sufficient to use in the indictment the phraseology expressing the general legal concept or legal conclusion, but specific facts constituting a concrete offense of the character intended to be charged must be enumerated and charged; as where the charge is that the defendant misapplied money, the facts supposed to amount to misapplication must be severally and individually stated.

United States v. Britton, 107 U. S., 655.

So, with particular application to the present case, where the charge is of using the mails in the execution of a scheme to defraud, it is not sufficient to say merely that the accused had designed a scheme to defraud, but the indictment must set out the scheme in such manner as will not only identify the particular scheme but will demonstrate that it was fraudulent.

United States v. Hess, 124 U. S., 483;
Stokes v. United States, 157 U. S., 187.

And the unlawful scheme or purpose must be sufficiently stated by appropriate averment of the facts essential to render it an unlawful scheme: if the scheme as unfolded in the body of the indictment is inadequately stated, the deficiency can not be repaired by a subsequent enumeration of acts done in execution of the scheme, although such acts, if alleged as within the purview of the scheme, would have made the statement adequate.

United States v. Britton, 108 U. S., 199.

Upon authority of these and numerous other cases of cognate character in this Court, and upon general principles of criminal pleading, which require no citation of authority in any court, it is assumed that the indictment now to be examined must set forth a scheme devised by the defendants to defraud the persons named; that such scheme must be so set forth as to be not only susceptible of identification as an individual scheme which is in its nature fraudulent or at least capable of being used to defraud; that all facts essential to the fraudulency of the scheme shall be severally and specifically averred; and that the indictment must, on its face and by reason of the specific facts stated, demonstrate that the scheme was a workable one and calculated to effect a dishonest design.

From the preceding general statement of the scheme here charged it appears that it was essentially one to obtain money by false pretenses. It was therefore incumbent upon the pleader so to develop the alleged scheme and to enumerate its constituent elements as they existed in the minds of the accused as to show that the defendants contemplated and intended at least these things to be done, to exist, or to supervene; that certain representations, which were in fact false, should be made by the defendants; that these representations should be by the defendants known at the time to be false; that such representations should be addressed or in some manner, within the intention of the defendants, even communicated to the persons proposed to be defrauded; that such communication to those persons should be made with the intent on the part of the defendants that the other persons should believe, and should rely and act upon, the false representations; that the persons to be defrauded should in fact not know that the representations were false, but should believe and act upon them, and should give money to the defendants in reliance upon the truth of the false statements to be made.

All these facts must by affirmative averment appear to have been contemplated and intended by the defendants at the time at which they consummated their offense by a guilty use of the postal system.

Moreover, since the alleged falsity of the representations essential to this scheme lay in the fact that the defendants were unable to perform their promises to obtain the lands proposed to be entered, the indictment must show how and why the defendants were unable to procure the promised entries. To say that the accused were unable to procure the entries is as vague and in-

definite as to say that one intended "willfully to misapply" certain money, which is clearly insufficient as an averment of criminal intent or action. The abstract notion of inability must be reduced to concreteness by the statement of specific facts which constitute an identifiable reason for the impossibility of the entries. Otherwise the court is obliged to accept, and the defendants are obliged to plead to, the pleader's opinion that the entries were impossible, without information afforded to the court or to the defendants of any facts which may have been in the pleader's mind as rendering the defendants unable to procure the entries.

If these elementary principles of criminal pleading are applied to the present indictment, it will appear that that document is demurrable upon at least half a dozen grounds.

Some minor defects which, though of merely technical nature, render the indictment bad upon general demurrer, may be made the subject of only a general allusion. A casual inspection of the pleading (R., 2-4) will disclose that it utterly disregards the elementary rules concerning the assignment of time and place; that neither time nor place is laid at all for the conception of the unlawful scheme, or for the guilty knowledge or fraudulent intent imputed to the defendants, or for any matter incident to the contemplated execution of the scheme. Indeed, if punctuation and typographical arrangement signify anything, there is no affirmative averment at all in the first sentence, stating the scheme, that sentence being set off from the averment (on page 4) of using the mails by a period and a break in the text. Accepting the conventional import of this arrangement, the first sentence contains no predicate, but is a mere recital lead-

ing to nothing whatever. As a piece of literary composition, the indictment is unintelligible. As a piece of criminal pleading, it is wholly wanting in the indispensable connections requisite to indicate the mutual relevancy and concurrent operation of the elements alleged as constituting the offense sought to be charged.

The argument is, however, to be limited to several more substantial defects of the indictment, any one of which, as will be submitted, is fatal on general demurrer.

II.

THE FIRST SUBSTANTIAL DEFECT APPARENT ON THE FACE OF THE INDICTMENT IS THAT IT FAILS TO AVER THAT THE ALLEGED FALSE REPRESENTATIONS, WHICH CONSTITUTE THE SCHEME TO DEFRAUD, WERE INTENDED TO BE MADE TO THE PERSONS INTENDED TO BE DEFRAUDED.

In the first paragraph (R., 2) the indictment alleges that the defendants had devised and intended a scheme to defraud one Baker and several other persons named in obtaining money from them by means of divers false and fraudulent representations; but it is not said that such false representations were to be made, directly or indirectly, to the persons who were to be defrauded, or that such false representations were to be in any wise communicated to those persons or to come to their knowledge.

In the second paragraph (R., 3), wherein the proposed false representations are specifically set out, it is nowhere suggested that such alleged representations

were to be directed to the persons above named or anybody else. The words are, "That Edward M. Comyns and Carlos L. Bryon, and each of them, should represent," etc., stating divers facts to be represented, but to whom is not indicated. For all that is alleged, the defendants were to make these representations only to each other.

It is true that in this paragraph it is stated that the defendants intended to make an agreement with the parties to be defrauded, whereby the defendants should charge fees "for locating said parties and for securing for them title to said land," etc., and should agree to refund the fees so paid if the defendants should fail in securing title to the lands. And it is said that the defendants knew that they could not obtain the entries proposed.

But the indictment does not say, nor do these averments imply, that the defendants did in fact, or intended to, represent to the proposed entrymen that the lands could be gotten. An agreement by which an attorney undertakes, for a fee paid in advance, to institute certain litigation or other legal proceeding, and in the event of failure to refund the fee, does not import any profession on the attorney's part of his ability to obtain success in the proceeding. Such a proceeding may be, and often is, instituted by an adventurous client in reliance upon his own judgment and in accordance with an opinion as to the prospects of success which he has formed independently of the attorney's advice. And in this case, as far as appears, the persons intended to be defrauded may have been expected to act upon their own views concerning the practicability of the proposed entries, and to come to the defendants upon their own initiative and

wholly uninfluenced by any representations which the defendants had made or might make. Certainly, as the case is stated, the suspected clients could not have been influenced by representations which do not appear to have been brought, or to have been intended to be brought, to their knowledge.

For this reason if not for others, the indictment is substantially defective; and on this ground alone, if no other grounds existed, the demurrer was properly sustained.

III.

ANOTHER SUBSTANTIAL DEFECT IN THE INDICTMENT IS NOTICED IN THE OPINION OF THE DISTRICT JUDGE (R., 30), NAMELY, THAT THERE IS NO AVERMENT OF AN INTENTION OR PURPOSE ON THE PART OF THE DEFENDANTS THAT THEIR ALLEGED FALSE REPRESENTATIONS SHOULD BE RELIED UPON BY THE PERSONS TO WHOM SUCH REPRESENTATIONS SHOULD BE ADDRESSED, OR THAT THOSE PERSONS SHOULD BE THEREBY OR IN RELIANCE THEREON INDUCED TO PART WITH THEIR MONEY.

The alleged fraudulent design which the indictment attempts to disclose and identify is, as the District Judge justly remarks, in its effect and essential identity a scheme to obtain money by false pretenses.

In such a scheme the capital element is an intent that the persons to be imposed upon shall rely upon the false representations to be made, and shall pay money because of so relying.

Even in a civil action for deceit it is essential that the declaration shall aver an intention of the defendant that the plaintiff should believe, rely upon, and be induced to act by, the false representations.

2 Chitty Pleading (11th Am. Ed.), 702, note p;
Ames v. Milward, 8 Taunton, 637;
Haycroft v. Creasy, 2 East, 92;
Bedford v. Bagshaw, 4 H. & N., 538.

Among the elements of deceit as enumerated by this Court is that the false representation "was made with the intent that it should be acted on."

Southern Development Co. v. Silva, 125 U. S., 247.

It is not alleged that the persons designated as those to be defrauded in fact believed, or were by the defendants supposed or intended to believe, that the false promises of the defendants were true. On the contrary, it is quite consistent with the case stated that those persons were well aware of all the facts assigned as making the defendants' promises false, and were not at all deceived, or capable of being deceived or defrauded by such promises. If those persons did in fact know all that the defendants knew, and acted upon their own judgment rather than upon any belief in the defendants' promises, there could have been no fraud. Therefore, upon elementary principles of criminal pleading, it was necessary to negative the possibility—or the presumable actuality—that the persons to be defrauded were acquainted with the true state of the case, and to make affirmative averment that those persons were to believe and to rely upon the false promise of the defendants.

This possibility, that the persons named as those intended to be defrauded were in fact not deceived and could not have been deceived by the defendants' false promise, is quite distinctly suggested when we come to learn the reasons assigned for alleging that the proposed entries could not be made. Assuming for the moment that we may look to the bill of particulars for information on this point, it appears that the entries to be bargained for by the defendants were impossible for one or both of two reasons: the fact that the applications were to be made in a form alleged to be defective, and the fact that the lands proposed to be entered had been selected as indemnity school land by certain selections filed in the name of the State.

Now, as the former of these objections to the success of the proposed entries is a pure matter of law, it is on general principles to be presumed that the persons to be defrauded knew the law applicable to the subject as well as did the defendants. If the law required the applications to state certain facts, and the applications actually filed or intended to be filed did not measure up to that requirement, the applicants were presumably aware that their applications were insufficient and that their proposed entries could not be made. If that was so, they could not have believed the false representations of the defendants who promised to obtain the lands for them.

At any rate, in the presence of the legal presumption on the subject, there was need of affirmative averment sufficient to rebut that presumption and to disclose at least the possibility that the persons to be defrauded in fact believed, relied upon, and were imposed upon, by the false representations on this point.

The other fact assigned as reason for rendering false the representations and promises of the defendants, namely, the existence of prior claims to the lands, was a matter at least as likely to be known to the defrauded persons as to be unbeknown to them. At all events, as the case is stated, taking in the bill of particulars, there is no reason to suppose that the persons to be defrauded were not fully informed of the existing State selections and amply advised as to their validity. And if that was true, then no amount of false representation made by the defendants as to the possibility of securing the proposed entries would work a fraud upon the would-be entrymen, or render the defendants guilty of the offense here charged.

In the actual administration of the public land laws, as the reports of this Court abundantly show, the case is by no means uncommon wherein a man, knowing that a tract of land is covered by an entry of record, chooses deliberately and intelligently to make application to enter that tract, relying upon some defects in the existing entry, and believing, with more or less reason, that his application will entitle him to take advantage of such defects and result in the cancellation of the entry to his own benefit. In fact, as will hereinafter be attempted to be shown, that mode of initiating adverse title to land already entered and of attacking the prior entry is, or at various times has been, recognized by the Land Department as a regular and effective practice; and the reports of the Interior Department disclose numerous instances in which such applications for tracts covered by existing entries have been successful and the applicants have thereby acquired titles against former entrymen.

Now, in the present case, it may be true, as the indictment and the bill of particulars suggest, that it was actually and legally impossible for the proposed entrymen to obtain title to the tracts desired, because those tracts were segregated by existing entries; and it may be that the defendants, knowing the impossibility on this account, made false and fraudulent promises. But it may, so far as the indictment suggests, be equally true that the intended entrymen knew as much as the defendants knew about the prior entries and the consequent impossibility of making effective applications, but were, notwithstanding, willing to make adverse applications for the sake of challenging the validity of the prior claims and to take chances of success. In that case there could have been no fraud, actual or intended, upon the persons intended to be defrauded. And, because the indictment fails to negative such knowledge on the part of the persons to be defrauded, it omits an essential ingredient of the offense sought to be charged.

IV.

THE ALLEGED FALSE REPRESENTATIONS WERE IN RESPECT OF A MATTER OF LAW.

The defendants were, as is alleged, to represent to one Baker and others that the defendants could obtain for those persons the right to make entry under the public land laws of certain lands.

The falsity of this representation consisted, as is alleged, in the fact that the defendants "could not locate said parties and could not secure for them the preference right to purchase" the lands mentioned.

Whether a tract of land is or is not subject to entry is a matter of law. And what is the law is, essentially and in almost all cases, a matter of pure opinion. Therefore, a representation concerning a point of law, though it be in fact untrue, and even though believed by the person making it to be untrue, is not even an actionable deceit; and *a fortiori* is not an indictable offense.

This principle is so elementary that it would be superfluous to cite the multitudinous authorities on the point.

When, in the case here stated, the defendants represented that they could obtain for their clients certain tracts of land, the representation was in its nature and on its face only an expression of the defendants' opinion as to the law and could not have been understood by the clients to be anything more. The possibility or the impossibility of securing the lands was a point upon which the clients had equal opportunity, and so far as the case shows equal ability, with the defendants to form opinions; and for aught that appears, the persons sought to be defrauded may have exercised their independent judgment and acted upon their own conception of the law and of the probabilities of success. But, whether they did or not do this, the alleged false representation was not one of which an indictable deceit could be predicated.

If the general principle here suggested is subject to any qualification, it is that which is thus intimated by this Court:

> "That a misrepresentation or misunderstanding of the law will not vitiate a contract, where there is no misunderstanding of the facts, is well settled."

Upton v. Trebilcock, 91 U. S., 45, where numerous authorities to like effect are cited.

But here no misunderstanding of the facts, or even of the law, is suggested. It is not hinted that the alleged false promises which are imputed to the defendants implied either an actual or an intended misrepresentation of facts, or that there was on the part of the persons to be defrauded any misunderstanding or insufficient understanding of facts. As has been pointed out it is quite consistent with the case stated that the proposed entrymen were fully advised of the existing conditions relating to the lands desired, and understood quite as thoroughly and as accurately as did the defendants all of the matters of fact and the considerations of law bearing upon the possibility of securing entries.

V.

THE AVERMENT THAT THE DEFENDANTS COULD NOT PROCURE THE ENTRIES PROMISED BY THEM TO THEIR CLIENTS IS NO MORE THAN THE STATEMENT OF A LEGAL CONCLUSION FOR WHICH NO GROUND IS SHOWN.

The indictment itself, disregarding the bill of particulars, alleges on this point simply that the defendant knew that they could not secure for their clients the right to make the entries proposed.

A tract of land may be incapable of entry for a great variety of reasons, some having relation to matters of fact, some to matters of law, and some to matters of mixed law and fact. It may be impossible to make entry of a specific tract because that tract does not exist. Or because it has already been patented. Or because it is

or is not of a certain character or in a certain predicament—as being swamp or mineral land or in reservation —the existence and effect of which character or predicament depend upon mingled considerations of law and fact. And when the question is whether a particular tract may be entered by a particular person, the possibility may be affected by such factors as the qualification of the intending entryman to make the particular kind of entry proposed, or the fact that the land has already been entered, and by an infinite diversity of other matters which may or may not exist in the particular case.

To say, then, that a given tract can or can not be entered by a given person is merely to state a legal conclusion which the pleader—if he proceeds rationally and has properly considered the subject—has drawn from facts which he knows or thinks he knows, and from principles of law which he supposes to be applicable to those facts.

In the present indictment we have only the pleader's conclusion of law, that the defendants could not procure the proposed entries to be made by their clients. What are the facts, and what are the legal principles, from which this result is deduced, he keeps to himself. The Court is desired to believe upon the mere assertion of the pleader, not only that the facts exist which he has in mind, and are sufficiently ascertained and correctly understood by him, but that he was unerringly applied to these indefinite facts the proper principles of law. In other words, the Court is required to assume that the lands in question were incapable of entry merely because the District Attorney says that he thinks so, and without opportunity to form any judgment as to the validity of his reasons or the soundness of his opinion.

It may be that the District Attorney was mistaken in his opinion, either because he was misinformed as to the facts or because he misconceived the law applicable to such facts. If the grounds of his conclusion were disclosed, it might be possible for the defendants to take issue as to the supposed facts and to disprove them; and it might be that the Court would be able to correct some erroneous notions of his as to the law; and it might for one or the other or for both of these reasons, appear that the representations made by the defendants as to their ability to secure entries, though believed by the District Attorney to be false and fraudulent, were in reality perfectly true.

Such, indeed, seems to be the case in this instance. So far as the reasons of the District Attorney for his conclusion as to the impossibility of entry can be gathered from the attempted supplementation of the indictment, it is believed that the ensuing argument will show that his reasoning was unsound and his opinion erroneous. But, whether or not that be accomplished, and granting that facts existed which warranted his assertion that the lands could not be entered, the result is equally that the indictment is fatally defective in that it calls upon the defendants to plead to a mere opinion of the District Attorney without any indication as to the grounds in fact or in law for that opinion.

VI.

THE INDICTMENT IS NOT HELPED BY THE BILL OF PARTICULARS.

By the common law, and in the Federal Courts by the Constitution of the United States, an indictment

cannot be amended save by the grand jury. The prosecuting officer has no power to amend an indictment; and even an order of the court is not competent to that end, although the only alteration made is the suppression of words held to be superfluous.

Ex parte Bain, 121 U. S., 1.

A fortiori, the District Attorney cannot amend an indictment by supplementing it with additional averments, which should have been in the original, but which the grand jury has not seen fit to make.

In this case, the indictment was concededly defective for the reason, among others, that it alleged only the legal conclusion that the proposed entries could not be made, and because it failed to assign as grounds for that conclusion any specific facts found by the grand jury and by it considered reasons for supposing the entries impossible. These requisite facts the bill of particulars undertakes to supply, by stating matters which are assumed to constitute the impossibility of making the entries. Even if it could be granted that these added facts are in themselves sufficient to validate the indictment, still the facts so specified do not appear to have been found by the grand jury. They are simply matters which have occurred to the District Attorney as being objections to the proposed entries, and are stated only upon his authority and as facts within his knowledge. There is no reason to suppose that the grand jury ever knew these facts or had them in mind as grounds for alleging that the defendants could not obtain the lands to be applied for. The grand jurors may have known, or thought they knew, of other facts which in their opinion made it impossible for the defendants to obtain

the lands proposed to be entered. The indictment as supplemented by the bill of particulars is, therefore, in its most material element, a charge made by the District Attorney and not the presentment of the grand jury. The Bain case, *supra*, which follows numerous and unanimous authorities stating a well settled rule of the common law, establishes that the defendants must be tried, if tried at all, upon an indictment as formulated by the grand jury upon facts found by them, and not upon some charge insufficiently made by that body and amended by the afterthoughts and interpolated allegations of the District Attorney.

In criminal cases, especially, a bill of particulars is no part of an indictment.

> "The bill of particulars, not being made by the grand jury on oath, cannot supply any defect in the indictment. Nor, in reason, should the court suffer any otherwise insufficient allegation to pass, on the ground that it has power to order particulars from a person not of the grand jury."
>
> 1 Bishop, Crim. Procedure, Sec. 646.

In Commonwealth v. Davis, 11 Pickering, 432, it was said by Shaw, C. J.:

> "The bill of particulars affects the proof and mode of trial only, and not the indictment; it is no part of the record, it is not open to demurrer * * * It is no part of the record, it would not appear in the judgment, or in any respect change its character or effects. It is notice of the kind of proof intended to be given to establish the general charge."

This case is cited with approval in Dunlop v. United States, 165 U. S., 491.

Even in cases not criminal, and as a principle of pleading generally, a bill of particulars cannot add substantial averments to a declaration. The office of such a bill is to specify and particularize matters already sufficiently, although generally, averred in the original pleading, but it cannot supply additional matters. A bill of particulars may limit but not enlarge, weaken but never strengthen, the pleading to which it is attached. But here the endeavor is to make by the bill of particulars material averments which should have been made in the indictment, but which are not there made. It is not an effort to particularize a general averment of the indictment, but to supply something which is not even indefinitely averred in the original document.

If the indictment had stated that the entries proposed by the defendants were impossible because certain entries or State selections of the lands to be applied for had theretofore been validly made by persons duly qualified or authorized to make them, and that such entries or selections then existed of record, whereby the lands which the defendants intended to apply for were effectually segregated from entry and legally appropriated so that the proposed entries could not be admitted to record, in such a state of the record no doubt a bill of particulars would have been demandable for the purpose of ascertaining to the defendants the precise evidence upon which the Government intended to rely. And very possibly, after such mode of averment, a bill of particulars, specifying the individual entries and selections relied upon as constituting the impossibility of entries by the defendants, might have been effective to identify

the prior claims thus indefinitely described and so to limit the generality of the original averment.

But here the averment antecedently requisite does not, even in the most general form, occur in the indictment. That document alleges simply that the proposed entries could not be made, but no facts are stated, even by the loosest and most indefinite form of averment, which rendered those entries impossible. When the bill of particulars undertakes to specify the facts because of which the entries could not be made, it does not particularize matters within the scope of a comprehensive averment, already made, but it seeks to make an additional and independent averment of matter which should have been, at least in some form, stated in the indictment, and of which there is not the most indefinite suggestion in that paper. This is not restraining the generality of a foregoing averment, but a bold attempt to supply a material averment which has been wholly omitted.

VII.

EVEN IF A DEFECT IN AN INDICTMENT COULD BE SUPPLIED BY A BILL OF PARTICULARS, THE BILL HERE FILED IS WHOLLY INSUFFICIENT TO SUPPLEMENT THE DEFECTIVE AVERMENT SOUGHT TO BE VALIDATED.

The bill professes to assign grounds for the averment, made in the indictment, that "the defendants could not locate the said parties and could not secure for them the preference right to purchase from the United States"

the tracts proposed to be entered. The form and legal sufficiency of this attempt to allege facts constituting the impossibility of making the entries are exemplified by these assignments made by the bill:

> "That Carl S. Baker's claim was in conflict with the State indemnity selection."
>
> "That Charles H. Parent was in conflict with Clarke's lieu selection and because the land had not been examined in person, as shown by the application, and because his application was defective in this: That it read, 'I, from information and belief, state that said land,' instead of saying that on a certain date he examined said lands and 'from my personal knowledge state, etc.'"

The other assignments are, at least, equally meager and indefinite (R., 24).

Of course, a bill of particulars is not a pleading, and still less is it to be treated with the strictness applicable to an indictment. But this bill of particulars undertakes in effect to do the office of a pleading, in that it professes to supply matter which should have been furnished in the indictment itself. The purpose is not to indicate by specification of particular facts the application of a precedent averment sufficiently made, though too general and indefinite in form, but to state affirmatively and in the first instance facts not previously alleged at all. In other words, since the facts which made the proposed entries impossible had not been stated, even indefinitely, in the indictment, the intended supplementation of that pleading required amendatory averments which should affirmatively and distinctly show the matters omitted

from the indictment. To this end, it was requisite that the facts assigned as reasons for the impossibility of the entries should be alleged if not so fully and so precisely as in the original pleading, at least so positively and with such apparent effect that the statement should on its face, or by reference to matter previously stated, import something material and legally sufficient to support the charge intended to be made. In particular, it was necessary that the matters specified in the bill of particulars should appear to have some such relevancy to those alleged in the indictment that one reading the two papers together might perceive that the facts particularized would in some way tend to show that the scheme stated in the indictment was fraudulent, that the entries constituting the deceitful element of that scheme were impossible, and that if the facts shown by both documents were established, the defendants were guilty of something.

The bill of particulars does not profess in any way to connect the facts which it specifies with the charge or anything else stated in the indictment. The clearest and most characteristic feature of the matters assigned in the bill is that they have no expressed or implied relation to the fraudulent scheme alleged in the indictment.

The scheme which is outlined in the indictment, and of which guilt is predicated, is stated as one existing only in the minds of the defendants. There is no suggestion that this scheme was ever put into execution; nor was it requisite that such fact should be shown, it being sufficient for the purposes of the statute that the defendants should have a fraudulent intent and should use the postal system in pursuance of that intent. At any rate, the indictment speaks of nothing but a fraudulent conception which was entertained by the defendants.

The bill of particulars specifies various facts apparently incident to certain actual transactions which were performed by persons other than the defendants, and which do not appear to have any relation whatever to the unlawful scheme of the indictment. From the very vague and parsimonious information afforded by this bill it may perhaps be inferred that the persons therein named asserted some kind of claims, or attempted some kind of entries, which proved to be invalid or doubtful by reason of conflicts with some anterior claims or because of certain defects in the applications filed. Inasmuch as the alleged delinquency of the defendants was limited to the mere contemplation of a fraudulent scheme which was not, so far as is said, ever put into practice, this suggestion of some actual enterprises attempted by other persons is, on the face of the papers, utterly irrelevant to anything in the indictment. It is impossible to understand how the dishonest design existing only in the minds of the defendants is particularized and given concreteness by the mention of certain transactions which were apparently undertaken by others and in which it is not pretended that the defendants had any concern.

It would seem, indeed, that the bill of particulars was drawn with the studious design scrupulously to avoid the mention of any matter which might, even by implication, connect the facts particularized with the fraudulent scheme of the indictment, or with anything else with which the defendants had anything to do. From the indefinite intimations of the bill it may be guessed that certain persons therein named asserted claims of some character to some lands, and that these claims encountered some difficulties by reason of certain objections in fact or in law which developed in the course of the

several transactions. From the identity of names it may perhaps be inferred that these claimants who experienced some trouble were the same persons who are mentioned in the indictment as the persons whom the defendants contemplated defrauding. But it is not pretended in the indictment that the defendants ever in fact caused or advised, solicited, or attempted to persuade these or any other persons to assert claims, or procured any entries or applications to be offered by anybody. Therefore, it is impossible to perceive any connection between the scheme imputed to the defendants by the indictment, and the entries sought by the other persons to be made as is intimated in the bill of particulars.

In fact, the very conscientious care with which the District Attorney in the bill of particulars refrains from suggesting any such connection seems to import that the entries specified were parts of a transaction wholly disconnected from the fraudulent scheme of the defendants, and a transaction in which the defendants had no part. Not only is it not, even by implication, intimated that the entries particularized were the entries which, or such entries as, the defendants had in mind to advise, or did in any remote way actually procure, but the pleader's special concern appears to have been directed to developing the fact that these entries were independent of any intent or participation on the part of the defendants. It is not stated when these entries were made or attempted, whether before or after the unlawful design of the defendants, or contemporaneously therewith; or that the defendants knew that these entries were to be attempted, or that the objections existed which are specified as existing to the claims; or whether those objections

did or did not prove fatal to the entries; or what in fact ultimately became of the attempted entries. It can not, from the indictment and bill of particulars taken together, be even surmised that the so-called claims mentioned in the bill were the proposed applications which it was a part of the defendants' fraudulent scheme to recommend; or that the conflicts specified in the bill were ever known to the defendants, or were the reasons why they knew that the proposed entries could not be made. Nor even does it appear that the facts specified in the bill made it impossible to make the entries to which those facts are assigned as objections. Indeed, for all that can be gathered from the bill, the entries may have been entirely valid despite the conflicts itemized, and it may be that these entries were actually allowed.

The vital defect in the indictment was the failure to show any facts by reason of which the defendants knew that the entries which they proposed to advise would be impossible. It was, therefore, vitally necessary that the bill of particulars should show that the defendants contemplated certain specific entries, that certain specific facts existed which made those entries impossible, and that these facts were known to the defendants. The bill of particulars not only does not show, but does not even permit it to be surmised, that the entries particularized were ever in the contemplation of the defendants or thought of in connection with their unlawful design, or that the defendants ever knew the facts which rendered those entries impossible or doubtful, or even that the entries specified were impossible. Because of this utter lack of connection between the entries specified in the bill of particulars and the applications which were in the minds of the defendants as incidents of the scheme

alleged in the indictment it is submitted that the indictment is not in the least helped by the attempted particularization.

VIII.

THE BILL OF PARTICULARS, EVEN SUPPOSING THE FACTS SPECIFIED TO BE APPARENTLY RELEVANT TO THE CHARGE, IS WHOLLY INSUFFICIENT IN POINT OF CERTAINTY AND ADEQUATE SUGGESTION OF FACTS.

The very purpose of a bill of particulars is to particularize, to reduce indefinite allegations to precision, to identify matters before too vaguely indicated, and to supply individualizing details that the facts alleged in the original pleading may be intelligently admitted or traversed. This the present bill not only fails, but does not even pretend, to do.

To say, for instance, as does this bill of particulars, that "Carl S. Baker's claim was in conflict with the State indemnity selection," does not at all conduce to the ascertainment of anything which has been indefiniely stated in the indictment, or to the ascertainment of anything else.

Who was Carl S. Baker, and what had he, or his claim here specified, or any other claim of his, to do with the fraudulent design imputed to the defendants? Or, supposing we may surmise from the identity of names that this Baker was the same Baker who is mentioned in the indictment as one of the persons to be defrauded, what claim did he have, or how and when was it asserted? Was it a timber land application, such as is said in the indictment to have been contemplated as part of the

defendants' scheme, or was it some other kind of a claim, a claim under a Mexican land grant perhaps, such as the defendants never heard of? And what is meant by the State indemnity selection? By whom was this selection made, and on what grounds, and for what land? Was it an indemnity selection under the school land grant of the State, or was it a claimed right of exchange under the Act of Congress of 1891, often loosely and inaccurately referred to as an indemnity selection? Was it in reality a selection of indemnity lands in place of those lost by the State, or was it a claimed right to exchange State lands that had after the vesting of title been surrounded by a Federal reservation for other lands owned by the Federal Government? Was it an actually authorized and apparently valid selection, or was it obviously void? Had it ever been admitted to record, or had it been canceled or held for cancellation?

The capital defect of this bill of particulars is that it does not particularize. The assignment just quoted is typical of all the items in the bill, none of which is any more definite in any respect. This mode of alluding to some entries and some selections does not in the least identify any material fact or disclose the materiality of the matter thus vaguely referred to, nor does it individualize anything which could be recognized as an element of the offense charged and so be either admitted or traversed.

The most that can be gathered from this meager and sketchy form of statement is that a certain Baker, presumably but not certainly one of the persons intended to be defrauded, did at some time not specified assert a claim of character not indicated to some land not identified, which claim was in conflict with something which

purported to be a State selection, but a selection as to which we know not whether it was actually or *prima facie* valid, voidable or void. All this might be admitted, but the admission would not in any way conduce to show that the defendants had been guilty of a fraud. All this might be traversed, but the disproof of all that is alleged would not even remotely tend to show that the defendants were innocent. All that is said may be either true or false, Baker's claim may have been valid or not, successfully asserted or not, but upon proof either way we are not in the least enabled to see that the defendants either did or did not entertain a fraudulent scheme.

It would seem from the record in this case that there has arisen of late a new school of criminal pleading, of which the cardinal canon is that all precision is superfluous and a remnant of now happily obsolete barbarism. Whence it seems to follow that it is no longer desirable to identify any fact alleged as going to constitute a crime, and it is but pitiable pedantry to individualize the elements of the offense sought to be charged. The prime beauty of this system is the absence of concreteness. It is unnecessary to cite authority to show how this doctrine is radically at variance with the conservative holdings of this Court. And it would be presumptuous to point out to this Court how such laxity is subversive of the constitutional principles intended to operate as safeguards for all persons accused of crime.

IX.

ASSUMING NOW THAT A BILL OF PARTICULARS MAY VALIDLY SUPPLY AVERTMENTS

ESSENTIAL TO THE OFFENSE BUT WHOLLY WANTING IN THE INDICTMENT, AND PRESUMING UPON THE INDULGENCE OF THE COURT TO CONSIDER THIS BILL OF PARTICULARS AS MAKING SUCH AVERTMENTS WITH A TOLERABLE DEGREE OF CERTAINTY, IT IS SUBMITTED THAT STILL NO OFFENSE IS SHOWN. AND THIS FOR TWO REASONS: THE INDICTMENT AND THE BILL OF PARTICULARS, TAKEN TOGETHER, DO NOT STATE FACTS IMPORTING FRAUDULENT INTENT ON THE PART OF THE ACCUSED; AND, IF SUCH FACTS MIGHT EVINCE FRAUD IN THE DISTRICT ATTORNEY'S VIEW OF THE LAW, THAT IMPUTATION IS IMPOSSIBLE BECAUSE THE CONCEPTION OF THE LAW WHICH UNDERLIES THE INDICTMENT IS DEMONSTRABLY ERRONEOUS.

X.

THE GROUNDS ASSIGNED BY THE BILL OF PARTICULARS FOR ALLEGING THE ENTRIES TO BE IMPOSSIBLE DO NOT WARRANT THE ASSERTION THAT THE DEFENDANTS' PROMISES WERE FALSE AND FRAUDULENT.

The bill of particulars very vaguely suggests that each of the proposed entries was impossible for one or both of these reasons:

That the form of application was defective and invalid in that the affidavit failed to aver that the applicant had made personal inspection of the land, but alleged the timbered character of the tract only upon information and belief; and

That the tract sought to be entered had been selected by the State of Washington as indemnity school land.

Let it be assumed, *pro argumento*, that both of these facts rendered it impossible, in point of law, to make the entries proposed. Let it be assumed also that the defendants knew that, as the law was held and stated, the proposed entries could not be made. What then?

The underlying predicate of the indictment is that any person who advises another to attempt any undertaking which some court or other judicial authority has pronounced impossible is thereby guilty of a false and fraudulent representation.

This, it will be observed, assumes, and requires everybody to assume, not only that the law is immutable, but that every constituted judicial authority is infallible and inflexible. Whenever any court or other tribunal has once declared that the law is so and so, anyone who undertakes or advises anyone else to undertake any assertion of right or other project inconsistent with that declaration practises a fraud, because it is known to be impossible to persuade any court to admit an error in its own rulings or in the rulings of any other constituted judicial body.

In the present case, the entries could not be made because the Interior Department had presented that the applicants for timber land must swear to personal knowledge of the land, and had also laid down the rule that no entry could be received for land covered by an existing entry. Therefore, the defendants knew that the proposed entries were impossible; since the rulings of the Interior Department on these points must be correct, and since, even otherwise, such rulings could not possibly be altered by the Department or corrected by the courts.

Ergo, the defendants committed a fraud in advising their clients to attempt a legal impossibility.

From this reasoning it results that any attorney who institutes a suit which he knows cannot be maintained under the then accepted rulings of the courts is guilty of fraud. Every attorney who even files a defective declaration is likewise guilty if he knows that such form of declaring has been held insufficient, even though he may hope and believe that he will be able to procure a different holding. It matters not that he intends to test the soundness of the existing doctrine, or that he has reason to believe that the suit or the pleading, though subject to valid objection, will answer its purpose or subserve some other purpose; in any such case he misleads and defrauds his client.

In this case, as has been pointed out, this principle is assumed to operate even though the client is fully informed that the law as held is against him and is well advised that he is proceeding against a judicial holding which, if not modified, will defeat him; there is no reason or excuse for inferring from this indictment that the persons to be defrauded did not know that their applications were defective and that the land office would presumably reject their entries on account of the State selections, or for supposing that they were not fully prepared to contest the soundness of the Departmental doctrine on these points.

On the contrary, it fairly appears, even from the meager information vouchsafed by the indictment, that the proceedings advised and undertaken by the defendants were intended for the very purpose to test the rulings of the land office on these two subjects. Such an inference thoroughly accords with the presumption of

innocence, and that presumption is not here rebutted or impaired by any averments sufficient to exclude an innocent intent. Assuming, as must be assumed because it is not negatived, that both the defendants and their clients knew of the existing State selections and were apprised of the Departmental rules relating to timber land applications and to the admission of secondary entries, the only rational explanation of the proceedings stated is that the parties concerned hoped and expected to procure the Department to abrogate the requirement of personal inspection and to hold the selections void or voidable. And, when it is observed, as will hereinafter be pointed out, that it had been held by courts of high authority, first, that the Departmental requirement was invalid, and, second, that the selections were void, the conclusion is almost demonstrable that everybody concerned in these undertakings intended to obtain the lands by taking advantage of these judicial declarations of the law and of the presumable change of rulings at the Department.

XI.

THE APPLICATIONS MENTIONED IN THE INDICTMENT WERE NOT DEFECTIVE IN LAW FOR FAILURE TO SHOW THAT THE APPLICANTS HAD PERSONAL ACQUAINTANCE WITH THE LANDS. IT WAS THEREFORE NOT IMPOSSIBLE ON THAT ACCOUNT TO SECURE THE ENTRIES SOUGHT TO BE MADE.

For present purposes of argument it is assumed that a bill of particulars may validate an intrinsically insufficient indictment, and that the bill herein filed—hopeless as it

is as a criminal pleading—is sufficient to that end. Treated thus indulgently, the bill of particulars may be understood as intending to import that some of the applications to be tendered by the defendants were defective because the affidavits filed therewith alleged the timbered character of the lands only upon information and belief, and not as a matter within the personal knowledge of the applicants.

From this fact the inference proposed to be drawn is that the applications must necessarily have been rejected by the land office; whence it is further to be deduced that the defendants, in advising the applications to be filed, knew that it was impossible to obtain entries for their clients.

By a regulation prescribed by the Interior Department some years before the date laid in the indictment, and then and still in force, it is required that every applicant for land under the Timber and Stone Land Act of 1878 shall swear that the tract applied for is unfit for cultivation and valuable for the timber or stone thereon being, and this averment must be made as a matter of the applicant's own knowledge derived from his own actual inspection of the tract; and to insure that the applicant shall thus speak from personal acquaintance with the fact, it is required that he shall swear that on some certain date he visited the land in person and examined it with reference to its character.

In the present case it is by liberal implication alleged, and the fact purports to be shown by copies of the affidavits filed by the defendants for their clients, that the applicants were advised to apply for the lands sought by them to be purchased by filing affidavits in which the

character of the tracts was stated upon information and belief and without averring that the applicants had ever in person visited the lands to be entered.

These affidavits were, therefore, insufficient under the existing regulations of the Interior Department. And the applications, being thus defective, are assigned as evidence that the defendants knew that they could not obtain the lands for their clients.

Neither in the indictment nor in the bill of particulars is it alleged that the defendants knew of the Departmental regulation, or knew that the affidavits were defective, nor is it alleged that the persons to be defrauded did not know of those facts. If it is to be presumed that the defendants knew the regulation as a matter of law, then by the same presumption the same knowledge must be imputed to their clients, who were as much bound to know the law—if this was law—as were the defendants. The indictment, therefore, even as supplemented by the bill of particulars, is fatally defective in respect of this essential element of the crime sought to be charged.

Granting, however, that this defect may be ignored, the present insufficiency of the affidavits does not prove that it was impossible to obtain the lands, even if the regulation were valid. It is not alleged that the applicants had not in fact visited the lands; it is obviously possible that they might thereafter, should it become necessary, make such visits. In either case, there would have no difficulty in filing amended affidavits which should show the requisite acquaintance with the lands and insure the right to enter. The fact, if it be a fact, that it was impossible to make the entries proposed upon the affidavits first filed, does not in the least imply that

the entries were intrinsically impossible or that the lands could not be acquired by further and more correct proceedings.

If the theory of the indictment is correct, every attorney who files a demurrable declaration is guilty of falsehood and intent to defraud, notwithstanding that the practice admits of amendments, and whether or not the attorney knows his pleading to be defective, and whether or not he intends to amend if a demurrer be sustained, and even though the declaration is susceptible of being made good by the simplest and most obvious amendment.

The regulation, moreover, was legally invalid, being beyond the competency of the Department to prescribe.

The Timber and Stone Land Act of 1879 (20 Stat., 89), provides in its first section that the surveyed public lands of the United States, lying within the States of California, Oregon and Nevada and the Territory (now State) of Washington, which are valuable chiefly for timber or stone but unfit for cultivation, shall be sold to persons qualified as the Act prescribes at certain prices.

Section 2 of the Act prescribes the procedure to be followed for the purchase of lands under the Act, providing that the intending entryman shall file a written statement, under his oath, setting forth, among other things not material to the present question, "that the same (land) is unfit for cultivation and valuable chiefly for its timber and stone."

Section 3 enacts that notice of the application provided for in section 2 shall be published for sixty days, and that after the end of that period the applicant "shall furnish to the register of the land office satisfactory evi-

dence" of several facts, among which is, "secondly, that the land is of the character contemplated in this Act, etc."

The statute then prescribes other details of procedure, none of which bears upon the preliminary affidavit or written statement required by the first section. The regulations for the administration of the Act promulgated by the Department provide, *inter alia*, for an especially strict and searching inquiry to be made by the register when the applicant appears after publication to make the proof required by section 3 of the Act, prescribing the amount and character of the evidence to be adduced, and requiring that "The accuracy of affiant's information and the *bona fides* of the entry must be tested by close and sufficient oral examination." (The Act is reprinted and an extract from these regulations is set out in the report of Williamson v. United States, 207 U. S., 425, in the margin of pp. 455 *et seq.*)

The statute is exceptionally particularistic in prescribing the procedure to be observed, and the manifest intent is to provide in detail and quite completely all that is to be required.

The form and contents of the preliminary affidavit or written statement to be filed with the application are thus completely prescribed and fully disposed of by section 2, there being in the Act no other provision relative to that document. This section enumerates and defines all the matters which are to be the subject of averment in that paper, the character of the land, its condition with respect to occupation, cultivation and improvement, the absence of mineral content, the purpose of the applicant, and his innocence of any contract to sell the tract.

Neither this section nor any other requires that this statement shall be made upon personal knowledge of the

applicant or of anybody else, nor that the applicant shall have visited the land. All that is necessary is that he shall state certain facts, not that he shall offer any evidence of his assertions or shall indicate how he expects to prove them.

The proof of the facts alleged in the preliminary affidavit is provided for by section 3. Such proof is to be made after, not before, the publication, and is to be made by evidence satisfactory to the register, and ultimately satisfactory to the Commissioner of the General Land Office. Not even then is it necessary, so far as the Act goes, that the applicant shall show personal acquaintance with the land; and it can not be doubted that the facts to be proved may then be established by the testimony of other persons. Indeed, it is obvious, in the nature of the case, that in many or most instances the evidence of witnesses more expert in woodcraft and mining than the applicant would be more satisfactory than that of the applicant himself. Upon the question whether the land is or is not most valuable for timber, or whether it affords any indications of mineral character, the testimony of a cruiser or a miner is likely to be more persuasive than the opinion of one less versed in such matters who may be the applicant and whose judgment is based upon such casual inspection as could be had during a brief visit to the tract. In many cases laymen would be unable by the most thorough examination to determine the value of the land for its timber, such fact being ascertainable only by persons competent for this purpose, and a requirement of a showing of the character of the land derived from personal inspection would bar all such lands from entry by anyone except timber or stone experts. The substantial fact to be established is the character of the

land, a matter which is independent, and is to be established independently, of the applicant's knowledge or belief, a matter which is not to be proved until the application comes on for full and final hearing, and is then to be shown by whatever evidence is most satisfactory to the register.

No part of the Act, therefore, requires or presupposes that the proof shall be made on the personal knowledge of the applicant, or that he shall have visited the land.

Section 2 manifestly contemplates simply a preliminary statement, intended to serve, not as proof of the applicant's right, but only as a notice of his intention to prosecute that right and to serve as the institution of the proceeding to that end, and which is to be made the subject of testimony at a later stage of the proceeding. This initial paper is fully analogous to and essentially identical with, the declaration or complaint in a suit at law, which is not proof, though it may be sworn to, but gives promise of proof to be made at the proper subsequent time. That the verification of such a pleading is not necessarily a matter of personal knowledge, but may be made upon information and belief, is believed to be the universal and well settled rule; Maclay v. Sands, 94 U. S., 586; United States v. Bryant, 111 U. S., 503; Rice v. Ames, 180 U. S., 374. And the case now in question is peculiarly one in which verification upon information and belief is appropriate and likely to be most effective, since the subject of the statement, that is, the character of the land, is one upon which, as before observed, the information given by experts in the exploration of land is generally more authoritative than the personal observation of the average applicant. This

view of the preliminary statement and of the significance of the verification is in substance stated and approved in Hoover v. Salling, 110 Fed., 43, *infra*.

The Departmental regulation requiring that the applicant shall have visited the land is, therefore, not in pursuance of anything prescribed by the statute, or even of anything which the statute implies. It is a super-added requirement, fixed by the Department alone, and resting for its authority altogether upon such inherent power and discretion as may be vested in the Department as an administrative agency.

The Departmental power does not extend to such super-addition of requirements. Where a statute prescribes a certain definite procedure for obtaining title to public land, and enumerates the things to be done by the applicant, the Secretary of the Interior has no authority to prescribe further conditions and to exact the doing of things not included in the statutory enumeration. Upon these points recent utterances of this Court are clear and conclusive:

> Adams v. Church, 193 U. S., 510;
> Williamson v. United States, 207 U. S., 425.

The requirement of personal acquaintance with the land is by no means a mere regulation adapted to secure the more orderly and effective enforcement of any provision of the statute, as was the case in United States v. Morehead, 243 U. S., 607, which is mentioned and very effectually distinguished by the trial court in its opinion (R., 29).

In the Morehead case the regulation required that the applicant making a soldier's declaratory statement under the Homestead Law should swear that his claim was

made for his own use and benefit, and not for any other person, and that the agent filing the statement had no interest in the claim. The Homestead Law required the fact to exist, and to be sworn to, and to be proved, that the homestead entry was not made for the benefit of any other person than the entryman (Rev. Stat., Secs 2290, 2291). The requirement that the applicant should include in his affidavit an averment to this effect, exacted only that he should swear to a fact which was legally requisite to the validity of his claim. As Mr. Justice Brandeis observed:

> "But the regulation does not add a new requirement in exacting the affidavit, as in Williamson v. United States, 207 U. S., 425. It merely demands appropriate evidence that the proceeding is initiated—as the statute requires it must be conducted—in good faith for the single purpose of acquiring a homestead."

The Timber and Stone Land Act undoubtedly requires good faith on the part of the applicant, as well as several other things; and whatever is requisite under the statute may properly be made the subject of Departmental regulation, and may be required to be proved in any appropriate and reasonable way. But the Act does not require that the purchaser shall have visited the land, or that he shall have personal knowledge of its character. It is quite true that the applicant must, before he can purchase, prove the character of the land; but he is not required to prove this by his own testimony, and still less is he required to prove it in his preliminary statement and in advance of the regular hearing provided for in section 3.

Any regulation which either exacts evidence in the preliminary statement, or exacts any particular kind of evidence, or obliges the applicant to know or to do anything which is not prescribed by the Act, is an addition to the statutory requirements which is beyond the competency of the Department.

The obvious effect, if not the manifest purpose, of the regulation in question is a very substantial impairment of the statute and a decided limitation upon the scope of its actual operation. If timber lands can be purchased only by those who have actually visited them, and are able to judge intelligently of their true character, then entries under the Act can, in general, be made only by those who live in the neighborhood of such lands and are competent judges of merchantable timber. Timbered regions are usually, if not always, remote from centers of population and from districts fairly settled, and tracts bearing timber are almost always especially difficult and expensive of access. The timber lands of the United States are all at a distance of several hundred miles, and most of them at a distance of two or three thousand miles, from the Atlantic seaboard. Yet the statute confers the privilege of buying such lands upon all citizens of the United States, those resident in the East as well as those in the West.

To say that a man may not buy a tract of timber land without first going in person to see it, is in effect to deny the benefit of the Act to virtually the entire population living East of the Missouri River, or, indeed, to virtually everybody who lives East of Utah or Nevada. It is to abrogate the Act so far as many persons living in the very States named in the statutory text are concerned, excluding as it does all who are too old, too infirm, or too

poor to make long, arduous and costly journeys, to withstand the hardships of travel on horseback and of camp life, and to absent themselves from business—excluding, that is to say, substantially all who dwell in cities or upon farms outside the timbered districts.

The practical result of the Departmental regulation is, therefore, to limit very materially the possible number of entries under the Act and to curtail the scope of its actual operation. This is certainly not the promotion of any statutory purpose, or giving effect to any of the statutory provisions, or otherwise facilitating the orderly and effective administration of the law. On the contrary, the effect is to defeat in large measure the statutory purpose to dispose of timber lands and to impair the operation of the law. In other words, the Department has enacted a virtual repeal of the Act of Congress.

This restriction of the provision for the sale of timber lands may be in pursuance of a sound policy; it may be advantageous to the public that the operation of such a statute as the present should be limited to the lowest possible degree. But the policy thus put into effect is not the policy of the statute, but a policy of the Department wholly without the statute. It is not the policy established and approved by Congress, but one by which the Department, in accordance with its own conceptions of public interest, limits and restrains, and *pro tanto* defeats, the expressed and well defined policy of the legislature.

Had Congress intended that the privilege of purchasing timber lands should be restricted to those persons who, by reason of their residence, wealth, health and habits, were able to travel to the least accessible regions of the remote West, the statute would have embodied

provisions to that result. The regulation of the Department, engrafting upon the actual provisions of the Act a new and generally impracticable condition, has largely defeated the statutory purpose and to a very great extent destroyed the intended value of the enactment.

To sustain this regulation as a competent and valid exercise of Departmental authority is to affirm the existence of an administrative veto upon every Act of Congress. In any case, as has been done in this, a statute may be in effect, and to a greater or less extent, repealed by the executive officer charged with is administration, whenever such officer considers that the statute as it stands operates in derogation of the public interest, or contravenes his own conceptions of public policy, or is otherwise at variance with his views of right or expediency. In the present case we have a very impressive instance of such a virtual veto under the guise of a regulation—a regulation which, professing to intend the promotion of the statutory purpose, in fact impairs the operation of the statute.

The regulation in question has for such considerations as those here suggested, been judicially declared to be invalid.

Hoover v. Salling, 110 Fed., 43, was a case directly presenting the question whether an applicant under the Act of 1878 was obliged to aver personal acquaintance with the character of the land and to show that he had visited it, and the case turned upon that point alone. The United States Circuit Court of Appeals for the Seventh Circuit, reversing a decree of the District Court reported at 102 Fed., 716, held that the Act did not require such knowledge and that the regulation prescribing that the

applicant must swear to the character of the land upon personal knowledge was beyond the power of the Department and therefore invalid.

This decision was rendered in 1901. It has never been, so far as counsel can discover, overruled or disapproved, and it seems to be, if not the only case involving the question, at any rate the latest and most authoritative adjudication upon the points. And, upon the authority of this case, and the intrinsic reasonableness of the opinion, it is submitted that the regulation is invalid and that the defendants were correct in advising their clients that they might make valid timber land applications upon information and belief.

At all events, whether this advice be deemed correct or not, it could not have been fraudulent or evidence of a fraudulent intent. The date laid in the indictment for the entertainment and attempted execution of the fraudulent design imputed to the defendants is in the year 1914. This was more than thirteen years after the decision by the Circuit Court of Appeals in Hoover v. Salling. For that period that decision had stood as the final ruling on the question involved, and the authority of the case had never been impugned or doubted. The defendants, therefore, in advising their clients as they did, advised in accordance with the law as it had been declared by a court of the highest respectability and almost the highest authority, and in accordance with the effect of the statute as it had been judicially understood for a considerable period of years, and as it seems still to be understood. It is difficult to perceive how the defendants could know that the affidavits proposed to be used were ineffectual when such affidavits were judicially pronounced to be sufficient. And it is submitted that

there could, so far as this feature of the case is concerned, have been no design to defraud in promising to secure the proposed entries upon the affidavits mentioned in the bill of particulars.

XII.

THE PROPOSED ENTRIES WERE NOT IMPOSSIBLE BY REASON OF THEIR CONFLICT WITH THE STATE SELECTIONS.

The amended bill of particulars assigns, as a reason why some of the entries could not be made, that they were in conflict with what are called "the State indemnity selection," or "Clarke's lieu selection," there being nothing in the bill further to identify the alleges selections, or to show by whom or on what ground they were made, or even to suggest that the selections mentioned were entered of record (R., 24).

By what is termed a bill of exceptions, which appears to have been drawn up and settled after the argument on the demurrer, it is certified that, at that argument, counsel stipulated, as a matter of fact, that certain of the applications mentioned in the indictment "were in conflict with lists of State selections which were for lands in lieu of such parts of sections sixteen and thirty-six as were included since the admission of the State of Washington in certain forest reservations." (R., 33.)

This is the full extent of the information afforded by the record concerning the existence, the authenticity and the validity of the alleged State selections. We are not told by whom the lists were filed, whether by the authorized officers of the State, or by some officers not competent to select indemnity lands, or by some wholly

unofficial and utterly irresponsible persons assuming to act for the State. It is not stated in lieu of what losses indemnity was claimed, or what grounds for claiming indemnity in fact existed, or what was the present or prospective status of the selections. Indeed, it does not appear even that the selections were of record; the only fact established, even by the stipulation, is that certain lists had been filed somewhere, perhaps in the land office, perhaps in somebody's law office.

So far as the averments go, the alleged selections may have appeared on their face to have been offered by unauthorized individuals, or the names of the State officers may have been forged. It may have been that the alleged lists had never been presented to the land office, or that they had been rejected by the land officers, and so never entered of record. It may be that the losses assigned to support the selections appeared by the records not to have existed. It may have been that the lands selected were manifestly not subject to selection. Or it may have been that the selections had been held invalid by the Land Department and were only awaiting the formal act of cancellation.

Indeed, it may be gathered from the opinion of the District Judge (R., 28) that the selections were in fact made in lieu of alleged losses, which were, as the law was held by the Supreme Court of the State and by other courts, not legal bases for selections, and the selections were void on their face.

No presumption that the alleged selections were genuine, or that they were actually or even apparently valid, is raised by the fact that they were filed in the land office, if they were filed there, or even by the fact that they were entered of record, if the fact of such entry can be

gratuitously assumed. Some showing of at least *prima facie* authenticity and validity, or at the very least that they were in fact made by some competent officer and were actually what they purported to be, was obviously and upon elementary principles requisite to warrant the averment that the existence of such selections rendered it impossible to make entry of the lands. It may be conceded that, if facts were stated showing that the alleged selections were apparently valid, or at any rate not void on their face, such facts would suffice for a pleading in the first instance, and that anything going to invalidate the selections would be matter properly coming from the other side.

But here is no attempt at any such showing of *prima facie* validity. It is quite consistent with all the averments of the indictment, the bill of particulars and the stipulation, taken together, that the pretended selections were obvious forgeries, that they were for lands manifestly not subject to selection, that they were for alleged losses for which the State was by settled law not entitled to indemnity, and that they had been rejected and never even admitted to record.

The charge, then, is simply that the defendants were guilty of an attempt to defraud because they proposed to apply for tracts which were covered by what purported to be State selections—the fact that the selections were of record being assumed without even an attempted averment to that effect.

The underlying major premise is that any existing entry of record, whether apparently valid, obviously void, or plainly voidable, renders it impossible for anyone, in any manner, ever to initiate an adverse title to the tract entered. And the conclusion is that anyone who offers

any form of application for a tract subject to any kind of existing entry pretends to attempt a thing which he must, as a matter of law, know to be impossible. Both these propositions must be accepted in the full degree of generality here indicated, and without possible exception or occasional qualification; otherwise this indictment cannot be sustained.

The indictment, it will be observed, does not limit the intended procedure of the defendants to the mere filing of applications for the lands to be sought. It is alleged, it is true, that the defendants represented to their clients that they could procure the lands by filing applications; but this does not import that the applications were the only and the final means proposed to be employed, or that anybody supposed that the applications would, of themselves, suffice to secure and perfect the entries. Indeed, the very nature of the proposed undertaking necessarily implied that other and ulterior steps must be taken; no timber land entry can be made by an application alone, since the statutory proceedings requires advertisements, the production of proof, and payment for the land. It cannot, therefore, be understood that the proposition made by the defendants limited them to the filing of the applications as the sole means of procuring the entries; the only reasonable understanding of the case as stated is that the filing of applications was contemplated by the defendants and their clients merely as the initial step toward obtaining the lands, an incident to a longer and larger procedure, and not as excluding the institution of formal contests or whatever else should prove to be requisite for procuring cancellation of the prior entries.

Unless the selections were in fact entirely valid and so beyond the possibility of successful attack, it was not

impossible to procure their cancellation and to obtain the lands. Although, as a general proposition, any entry valid on its face segregates the land, it is equally fundamental that no entry which is actually invalid can permanently withhold the land from adverse claim. Every invalid entry can be attacked in some mode, and will be cancelled when its invalidity is demonstrated in the proper manner. What in any given case is the proper and effective method of procuring cancellation—whether by mere application to enter, or by formal contest, or otherwise—is a question of Departmental procedure into which it is not now necessary to go. For the present, it suffices to suggest that, even assuming that the selections were of record and apparently valid, there is no reason to say that the defendants could not in some way procure entries of the selected tracts.

XIII.

NOR IS IT CLEAR EVEN THAT MERE APPLICATIONS WOULD NOT BE EFFECTIVE TO PROCURE CANCELLATION OF THE SELECTIONS.

It is no doubt true that, in general, any existing entry, not on its face void or voidable, segregates the land, and that, so long as such an entry stands of record, the tract is not subject to other entry.

But an entry which is void on its face, or one which appears by the record to be void, does not so segregate the land or bar the admission of another entry.

Even a patent which is void on its face may be collaterally attacked and ignored.

Polk v. Wendal, 9 Cr., 87;

Patterson v. Winn, 11 Wheaton, 380.

So held of the certification of a State selection: if the facts which make the invalidity of the selections are matters of statute and of record, the certification is void, and the lands may be subjected to any valid adverse claim by a proceeding at law, in which the certification will be treated as a nullity.

Deweese v. Reinhard, 165 U. S., 386.

The selections mentioned in the bill of particulars may, for aught that appears, have been void on their face. As has been suggested, we do not know by whom they were made, whether by State officers or by unauthorized persons; the lists may have been sheer forgeries. We are told nothing about the character or condition of the selected lands; they may have been, for some reason apparent on the face of the record, not subject to selection. It is not shown that the alleged losses in the school sections in fact existed, and such losses, if once valid bases, may have been previously compensated.

Moreover, as also has been suggested, it may have been that the selections were unwarranted by any law; indeed, if the actual state of the case may be inferred from the opinion of the District Court, the law of the State, as declared by the Supreme Court of the State, rendered the selections void.

If, for any of these reasons, some of which are suggested in the record, or for any other reason which may very conceivably have existed, the selections were obviously void, then the applications proposed to be made by the defendants were not only valid, but constituted a proper and effective means of initiating title to the lands.

Assuming, however, that the selections were not obviously void, it does not follow that the filing of applica-

tions for the selected tracts was erroneous, even in point of procedural propriety. Still less can it be said that such applications would have been ineffectual to secure title to the lands.

In theory, no doubt, an entry of record segregates the land, and precludes, so long as the entry stands, the admission of another entry. At the same time, it is not true that an application to enter the land so segregated is always, or even generally, ineffective to initiate an adverse right. On the contrary, the reported cases show that in many instances the filing of adverse applications has been held a sufficient, and even a quite proper, method of attacking existing entries.

The case of Holt v. Murphy, 207 U. S., 405, is an authority for the general rule on this subject, and applies that rule to a particular phase of the question. Yet the opinion in that case cites Departmental decisions which show that the practice of the land office has vacillated with reference to the specific point considered in the opinion and that the Departmental attitude toward adverse applications has varied at various times.

That the practice of the Department on this point has been by no means consistent, but has in general tended toward treating applications for tracts already entered as in the nature of contests against the entries, and especially as creating rights which attach to the land upon cancellation of the entries, will appear by examination of these cases, selected from a much larger number dealing with such situations:

Richards v. McKenzie, 12 L. D., 47;
Goodale v. Olney, 12 L. D., 324;
Maggie Laird, 13 L. D., 502;
Charles A. Parker, 11 L. D., 375;

Hause v. R. R. Co., 14 L. D., 525;
Henry F. Brune, 18 L. D., 38;
Jerry Watkins, 17 L. D., 148.

In a numerous series of cases, extending through a long sequence of years and several administrations, applications to enter tracts subject to existing entries have been treated as virtually instituting contests against the entries and as bringing the rights of the applicants into comparison with the merits of the entrymen.

Joel Docking, 3 L. D., 204;
J. M. McDonald, 15 L. D., 257;
Cooke v. Villa, 17 L. D., 210.

And in many cases applications offered for lands already entered have resulted in the cancellation of the entries and the award of the lands to the applicants.

Ernest Trelut, 3 L. D., 228;
Allen v. Curtius, 7 L. D., 444;
Campbell v. Jackson, 17 L. D., 417.

Where one applied to enter land covered by a subsisting entry, and alleges settlement or other right prior to that of the entryman, a hearing should be ordered; and, if the applicant's superior right is established, the entry should be cancelled and the applicant admitted to make entry for himself.

John W. Austian, 18 L. D., 23.

With reference particularly to State selection of indemnity school land, the general rule established by the Department appears to be, that an application to enter a tract of selected land shall be treated as a contest

against the selection, and such an application is to be accepted and made of record if the selection is found to be invalid.

Thus, in Niven v. State of California, decided in 1887, 6 L. D., 439, where Niven had filed an application for land covered by a State selection of record, Secretary Lamar said:

> "So long as the selection remains of record, the application of Niven should not be allowed. But it is to be noted that Niven's application is also in the nature of an attack upon said selection; or, in other words, a contest against it. And, since it is ascertained that said selection should be cancelled, no reason is apparent why Niven's said application should not be allowed.

The same principle is applied in

> Early v. California, 7 L. D., 347;
> George Schimmelpfenny, 15 L. D., 549;
> Sharpstein v. Washington, 13 L. D., 378.

These defendants, therefore, in proposing that their clients should offer applications for the lands selected by the State, intended in effect to institute contests against the selections and to impeach the title of the State to the lands. In so doing, the defendants were only following what had been authoritatively declared to be the correct practice in such a case, and a practice which had been observed until, at least, a date not very remote.

Whether the applications proposed to be filed would have been successful in procuring cancellation of the selections is another question, and one which is not raised by this indictment. The proposition is, not that the defendants knew the lands could not be obtained because

the selections were valid, but that they knew entry was impossible because the selections had been filed in the land office. Repeated declarations of the Department had demonstrated that the mere existence of a selection did not render impossible the acceptance of an adverse application, but that such application was the appropriate mode of drawing in question the validity of the selection. The charge, then, is that the defendants acted in bad faith because they knowingly adopted a wrong method of procedure, not that their bad faith consisted in knowing that the selections could not, in any way, be canceled. The form of procedure being shown to be correct, the only fact assigned as constituting guilty knowledge is negatived; and the fact—if it be a fact—that the selections could not be canceled because they were intrinsically valid, cannot help the indictment, since the validity of the selections is not alleged as a matter of fact, and still less as a reason for knowing that the lands could not be obtained.

XIV.

THE DEFENDANTS DID NOT KNOW, AND COULD NOT KNOW, THAT THE SELECTIONS WERE VALID AND THE LANDS IMPOSSIBLE OF ENTRY.

There is, as has been suggested, nothing whatever averred going to show that the selections were even *prima facie* valid. But by piecing together the indictment, the bill of particulars (R., 32), and the stipulation incorporated in the bill of exceptions (R., 33), and then reading the opinion of the court (R., 28), something may be inferred as to the character of the selections and

their legal merits. And from these papers, taken together, it appears that a very serious question existed as to the validity of the selections, and a question upon which the opinion of the court was against such validity.

In this way it may be collected that the tracts for which the defendants advised their clients to apply had been selected by the State of Washington as indemnity for lands in certain school sections which had been granted to and vested in the State, and which had, after the admission of the State, been included within the boundaries of certain forest reservations created by the United States.

The proposed entries advised by the defendants involved, therefore, the question whether the State of Washington was entitled, under the terms of the granting act and the Act of February 26, 1891, to surrender school sections which had become by survey vested in the State, and to select indemnity lands in lieu thereof, upon the ground that the school lands surrendered had been surrounded by public lands reserved for forestry purposes.

It seems that the indictment intended to charge that the defendants were guilty of an intent to defraud in that they advised their clients to apply for tracts selected by the State as indemnity for school lands embraced within Federal forest reservations.

In its ultimate analysis, therefore, the indictment charges that the defendants were guilty of knowing that the State of Washington had the right to make selections in lieu of school lands included in forest reservations.

If the defendants knew this, it was because they knew the law better than at least three courts of high authority,

and because they knew it so well that they were justified in setting their own opinion above divers adverse adjudications upon the point.

If the State had the right to make selections in lieu of school lands included within forest reservations, that could only be in virtue of the Act of Congress approved on February 26, 1891, amending sections 2275 and 2276, Rev. St. U. S.

In Hibberd v. Slack, 84 Fed., 571, decided in 1897 by the United States Circuit Court for the Southern District of California, the question was as to the validity of certain selections made by the State of California by way of indemnity for school sections embraced within forest reservations. The court held that, neither under the Act of 1891, nor under any other statute, was the State entitled to claim indemnity for such lands.

In State of Washington v. Whitney, 66 Wash. St., 473, decided in 1912, the Supreme Court of Washington, construing the Act of 1891 and the Act of 1889 by which was made the school grant to Washington, held that that State had no power to select indemnity for school lands vested in the State and afterwards included in a Federal forest reservation.

In Deseret Water, etc. Co. v. State of California, decided in January of 1914, several months before the date laid in the present indictment, the Supreme Court of California, following Hibberd v. Slack, held that California was not authorized to surrender school lands embraced within a Federal reservation and select indemnity in lieu of such lands.

In December of 1914, therefore, when the indictment charges that the defendants knew that the selections were valid, three concurring courts, a Circuit Court of the

United States, the Supreme Court of the State of Washington, and the Supreme Court of the State of California, had held that the Act of 1891 did not warrant the selection of indemnity on account of school sections included within forest reservations. At that date no one of these decisions had been reversed or overruled. One of the courts thus concurring was the highest court of Washington, the very State by which the selections in question had been made, and was the court peculiarly competent to pass upon the law and the lawful powers of that State. And, although the Department of the Interior entertained a contrary view of the Act of 1891, no court, so far as counsel can discover, had ever held that any State was authorized to make indemnity selections in lieu of school lands in Federal reservations.

It is true that the judgment in the Deseret, etc., Co. v. California was, in 1917, reversed by this Court, which differed in opinion from the three courts which had before considered the Act of 1891, and which held that the State of California was entitled under that statute to select indemnity for school lands included in Federal reservations (243 U. S., 415).

But this decision was not rendered until more than two years after the date laid in the indictment for the fraudulent representations imputed to the defendants. At the time when they advised their clients that the selected lands could be obtained, notwithstanding the selections, that advice was in accordance with the law as it was declared by the absolute unanimity of judicial expression on the subject. If in 1914 it was fraudulent to express the opinion that these selections were invalid, or void, the same criminous opinion was ground for the impeachment of all the judges of three highly respectable courts.

If the defendants were guilty of any crime in thinking that the State could not make such selections, it was a prophetic guilt which could anticipate that this Court would, in the remote future, hold the law to be the reverse of what it had been declared by every other court which had considered the points.

It should be added that the opinion of this Court in the Deseret, etc., Co. v. California, 243 U. S., 415, deals only with the effect of the Act of 1891 in its bearing upon the right of California to select indemnity for school lands included in reservations. The selections mentioned in the indictment, concerning which the defendants are charged to have given fraudulent advice, were made by the State of Washington, the school grant to which State was made by the Act of 1889. The provisions of this statute are substantially different from those contained in the Act of 1859, by which was made the school grant to California; and it is not unlikely that, if the question should be presented to this Court, the construction put upon the Act of 1889 would be that adopted by the Supreme Court of Washington in State v. Whitney, *supra*, where that court adverted to the peculiar phraseology of the Act of 1889, and held that its effect, with reference to the point now in contemplation, was very different from the effect of the California school grant. It is unnecessary to consider the difference between the two grants, since the question as to the actual validity of the selections here involved can hardly arise upon this record.

It may, however, be material to observe that the decision of this Court in the Deseret Company case does not declare the validity of the selections made by the State of Washington, and that there is, even yet, no ju-

dicial holding which overrules the decision of the Supreme Court of Washington that such selections can not be made by that State.

It does not, therefore, appear by any adjudication that the selections mentioned in the indictment were valid, or that the defendants were mistaken in their opinion that the selected lands could be obtained by their clients upon proper application therefor.

At any rate, whether the opinion express by the defendants in 1914 prove to be correct or erroneous, that opinion cannot be pronounced fraudulent or evidentiary of a design to defraud. The defendants advised their clients in accordance with the law as it then seemed to be settled. By the accepted understanding of the law, the selections were invalid, and the selected tracts could be obtained by proper applications made by qualified persons. If it should now be held by this Court that the tracts could not be obtained against the selections, that impossibility subsequently supervening could not affect the original good faith and reasonableness of the opinion expressed by the defendants four years ago.

It is accordingly submitted that the judgment of the District Court is correct and should be affirmed.

CHARLES A. KEIGWIN,
WILLIAM R. ANDREWS,
Attorneys for Defendants in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 235.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

EDWARD M. COMYNS ET AL.

SUPPLEMENTAL BRIEF FOR THE DEFENDANTS IN ERROR.

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SUPPLEMENTAL BRIEF FOR THE DEFENDANTS IN ERROR.

It is manifest from the record that everybody concerned in the case below—counsel on both sides and the judge—understood it to be one involving a certain specific and quite elaborate and complex scheme to defraud, such being the character of the scheme unfolded in the indictment. Of the matters alleged as constituting this scheme, the most essential was the fact that the lands whereof the defendants proposed to procure entries to be made were legally impossible of entry. The question, whether or not the entries were impossible, and whether such impossibility was sufficiently developed, was regarded by all as the cardinal points of the case.

Such was evidently the understanding of the District Attorney, the author of the indictment, who filed first a bill of particulars and then an amended bill of particulars in an endeavor to make his pleading sufficiently ample and definite to demonstrate the impossibility of the entries. That counsel for the defendants understood that the fraud charged lay only in the impossibility of effecting the entries proposed appears from their two demurrers and from their motion to strike out the bill of particulars (p. 26). The concurrent understanding of counsel on both sides to the same effect is disclosed in the bill of exceptions (p. 31). And the opinion of the court shows that the pivotal point and almost substantial matter submitted for decision was the sufficiency of the indictment with respect to the impossibility of procuring the entries as proposed by the defendants.

Counsel for the defendants in error, being obliged to prepare and print their brief before seeing that of the Government, argued the case as it was evidently understood, developed, argued, considered and decided in the lower court. Taking the case in that view—that is to say, assuming it to be the entire and identical case stated in the indictment—they are content with their former argument, and feel confident in submitting that the case, as it was presented to the court below, was correctly determined.

In the brief filed by the Attorney General in this court it is, for the first time, suggested that the indictment is sufficient, in that it charges the making of a promise to return the retaining fees in case of failure to secure the entries, with the intention not to do so; which false promise, it is contended, is sufficient, of itself and without regard to the other fraudulent features of the scheme as

formulated to constitute a scheme or artifice to defraud.

The proposition, therefore, is that all that goes before the averment of a fraudulent intent to keep the initial fees may be ignored, and the indictment held sufficient upon that final charge alone.

I.

Whether a simple promise to do a specific thing, made by mail and not intended by the maker to be kept, would be a scheme or artifice to defraud within the effect of the statute, is a question which is not to be argued here. It may be assumed for present purposes that a letter requesting a loan of money, to be repaid at a given day, the petitioner not intending to repay, would expose him to the penalties of this statute; or that the same risk would be current by a letter promising to do something which the writer does not expect to do. On this point we merely submit, first, that so simple and direct a breach of faith does not, in the ordinary and natural sense of language, constitute the "scheme or artifice to defraud by means of false or fraudulent pretenses, representations or promises "which the statute contemplates; and, second, if such is the law, it is a very dangerous doctrine, rendering it extremely unsafe to attempt to borrow money from a friend, or to transact many other kinds of business, if the mail must be used.

II.

But that is not this case. The indictment undertakes to state a much more extensive and complex scheme to defraud. This scheme included at least eight elements, namely:

That the defendants should represent themselves to be, respectively, an attorney and a land locator;

That they should represent that certain public lands were capable of being entered under the Act of 1878;

That they should agree to undertake the procurement of entries for those lands, for certain considerations;

That one of those considerations should be the payment by each of the propose clients of a retainer or initial fee;

That the defendants should promise to refund the initial fees if the entries should prove impossible;

That the entries were impossible;

That the defendants knew the entries to be impossible;

That the defendants did not intend to refund the initial fees if the entries could not be made.

All this constitutes a certain and particular scheme of definite form and recognizable identity, and we submit that the question presented by demurrer to this indictment is, not whether some other scheme of simpler construction and less copious content would be within the statute, but whether the specific scheme actually formulated by the indictment is so developed as to appear of fraudulent character.

It may be conceded that some particular element of the scheme designated—such as the false promise to refund—if standing alone or alleged in connection with other facts than those here shown, would fall within the operation of the statute. But it seems to us that, on this demurrer, that paricular feature can not be considered as if it stood alone or were stated in some other than the present combination of alleged facts, and that sound principle requires the case to be judged as it is stated by the indictment, taking that case as composed.

not of any single element, but of all the facts going to its identity.

Under the statute controlling this case, it is not sufficient to aver merely that the defendant had devised a scheme or some scheme to defraud, but the indictment must state some specific scheme, and so state it that it may be individualized. The purpose of this requirement is twofold:

First, to identify the particular scheme imputed to the defendant, by designating such features of it as will distinguish it from every other scheme which the defendant or someone else may have devised, so that the defendant, the court and the jury may know the concrete matter with which they have to deal: United States vs. Hess, 124 U. S., 483; and,

Second, to demonstrate the fraudulent nature and effect of the scheme, so that it shall appear on the face of the indictment to be an unlawful scheme: United States vs. Britton, 108 U. S., 199.

The present indictment states a certain definite and identifiable scheme, which is declared to be a scheme to defraud, and which comprises at least eight component elements. Each of these elements is as essential as any other to constitute the scheme, and each is as essential as any to the identity of the specific scheme.

To eleminate any one of these elements is to produce another scheme than that alleged by the indictment; and what is left, whether it be illegal or not, is at least a different scheme from that propounded in the indictment as the unlawful device in the execution of which the postal system was used.

The capital characteristic of the scheme as stated is that it contemplates the obtaining of money by false pre-

tenses. The clients were to be induced to pay retaining fees by false representations as to the possibility of making the entries. There was also, it is true, a false promise to return these fees if the entries could not be made; but that promise was only the means by which the previously formulated test scheme was to be executed and the antecedent fraudulent purpose was to be effected, both the promise and the intention to break it being rather incident and subsequent to the scheme itself than primary elements of it.

Now, it may be that such a false promise, if made with reference to a transaction in itself innocent, might be called an artifice to defraud within the meaning of the statute. It may be conceded that the indictment would be good if it had alleged that the lands were in fact subject to entry, and the defendants had contracted to procure the entries without making any false representations of existing facts, but only making false promises, which they did not intend to keep, about returning the fees. But if such had been the facts, and the fraudulent scheme had been stated as simply one to undertake a legitimate and feasible employment for the sake of obtaining fees upon false promises to refund, the case so disclosed would have been one essentially different from that developed in this indictment; because the two schemes laid as introductory to the false promises would have been substantially different, having nothing in common but those promises.

The proposition of the Assistant Attorney General is that the imputation of criminality to the scheme as here alleged may be ignored, and the element of false pretenses disregarded, and that the false promise constitutes of itself a sufficient scheme to defraud, even though the an-

tecedent negotiation be entirely legitimate. But that is as much as to say that it matters not whether the fraudulent device be correctly or incorrectly stated, or in any way defined and distinguished, provided some fraudulent feature be attached to it. And that is only another way of saying that it suffices to charge that the defendant had devised a scheme, or a certain scheme, or some scheme, to defraud, without identifying the scheme at all; which brings us to the very point upon which the decision in the Hess case, supra, is adverse to the proposition contended for.

Mere surplusage may of course be disregarded. But no matter can be ignored which is laid by way of description and for the purpose of identification. In cases of this character the rule requires the fraudulent scheme to be described and ascertained, and the very purpose of alleging the form and contents of that scheme is to identify it. If, now, the most substantial features of the scheme as stated may be eliminated, and what is left held to be a fraudulent device, the indictment no longer ascertains the specific scheme upon which the defendants are held to answer, and the residuary matter is something else than what is descriptively laid.

III.

Independently of the foregoing considerations, there remains a substantial defect in the indictment, noticed by the court below, and by no means met by the argument on behalf of the plaintiff in error. It is thus stated in the opinion of the court (p. 30):

> "In such a scheme to defraud, one in effect for obtaining money by false promises, among other things, it is necessary to allege and show that the promise was false; that it was known by the defendants to be false when made; that it was made, or to be made, with the intention that it should be believed and relied upon, and money paid upon reliance upon its truth.
>
> "If it be conceded that the first two of the foregoing requirements are made by the present indictment, there is no allegation that it was the purpose and intent of the defendants, in making the alleged false representations and promises to thereby induce their victims to either enter into the alleged agreement with the defendants or to part with their money."

The court does not, as the learned Assistant Attorney General understands, confuse the false promise alleged in the indictment with a false pretense "requiring to sustain it misrepresentation as to existing facts." On the contrary, the opinion speaks specifically of false promises having relation only to the future, and recognizes that such promises may be parts of fraudulent schemes within the statute; which is all that is decided in United States vs. Durland, 161 U. S., 306, cited by counsel. It is, in fact, primarily and in particular of false promises that the comment is made, and with especial reference to the false promise alleged in this indictment.

What the court holds is that a false promise, equally with a false pretense, must appear to have been made with the intention that it should be believed and relied upon by the promisee, who should thereby be induced to part with his money.

And in this the court was undoubtedly correct, so indubitably correct that it would be a waste of paper to cite authority in support of the ruling.

There is, it is true, as observed by the Assistant Attorney General, an averment that the defendants had formulated a fraudulent scheme to obtain from the persons named "their moneys and property by means of divers false and fraudulent pretenses and representations, to induce the persons intended to be defrauded to give to the said defendants, and to each of them, such moneys and property, etc." This is followed by a statement of the fraudulent scheme, which consisted of false presentations as to the possibility of making the proposed entries and of an agreement that the defendants would undertake to procure the entries upon payment of the initial fees and would refund those fees if they failed (p. 3).

The false promise to refund the fees is nowhere stated except as part of, and in connection with, this fraudulent agreement.

And it is not anywhere alleged that either the false representations or the false promises were to be made with the expectation that the persons to be defrauded would credit them, or rely upon them, or part with their money on the faith of anything that the defendants should say.

The indictment is, therefore, bad on this ground alone, and without reference to the other matters herein discussed.

Undoubtedly, matter laid by way of mere inducement need not be pleaded with the same formal strictness and particularity which are requisite in stating the gravamen of the case. But the statement of inducing matter must

embody all the substantive facts necessary to develop the relevancy and legal effect of what follows: otherwise—if the inducement might omit one or two matters essential to complete the cause of action—there need be no inducement at all.

Here, unless the scheme as described was fraudulent, there was no offense in the use of the mails. Unless the scheme, however otherwise dishonest, involved some communication with the persons to be defrauded and contemplated that they should be moved by such communication, it was not designed to defraud. The omission to allege that the representations mentioned were intended to be made to somebody and that it was expected and intended that somebody should rely upon and be influenced by such representations and by the fraudulent promise concerning the fees, therefore, leaves the scheme without one of the elements essential to its fraudulent character.

This is not a question of strict pleading or permissible laxity; the objection is, not that the matter is stated loosely or without proper particularity and precision, but that necessary matter is not stated at all. The defect is in matter of substance and leaves the case without the essential element of fraud.

It is accordingly submitted that the judgment of the lower court should be affirmed.

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Attorneys for Defendants in Error.

struction of § 215 of the Criminal Code, and was reviewable under the Criminal Appeals Act.

(2) That the indictment charged a "scheme or artifice to defraud," etc., within the meaning of said § 215.

Reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Kearful for the United States.

Mr. Charles A. Keigwin, with whom *Mr. William R. Andrews* was on the briefs, for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is a review under the Criminal Appeals Act (March 2, 1907, c. 2564, 34 Stat. 1246), of a judgment of the District Court sustaining a demurrer to an indictment found under § 215 of the Criminal Code (Act of March 4, 1909, c. 321, 35 Stat. 1088, 1130).

That section provides: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter . . . in any post-office, or station thereof, . . . to be sent or delivered by the post-office establishment of the United States . . . shall be fined, . . . " etc.

The indictment contains four counts, but a recital of the first will suffice, since the others adopt by reference that part of its averments upon which is raised the question we have to determine. Omitting formal matters, that count recites that Comyns and Byron had devised a scheme and artifice to defraud nine persons named and

divers other persons to the grand jurors unknown, that is to say, to obtain from them and each of them their moneys and property by means of divers false and fraudulent pretenses and representations and to induce the victims to give to the defendants and each of them such moneys and property, with the intent on the part of the defendants and each of them to convert the same to their own use, which scheme was as follows: that defendants should represent that Comyns was a lawyer, admitted to practice before the United States Land Office, and that Byron was a locator, "and that they could locate said parties and secure for them the preference right to purchase from the United States of America under the Timber and Stone Act of June 3, 1878 [20 Stat. 89, c. 151], certain land within the Western District of Washington for the sum of $2.50 per acre, by filing an application to purchase under said act, and that the said property was worth more than that sum"; and that they would agree with the parties to be defrauded that they would charge each of them a fee for locating them and securing for them the title to said land, a part of the fee, called the initial fee, to be paid at the time of making the agreement, and the balance when title to the land was secured, "and that if said parties to be defrauded failed to get title to said land, then the said defendants and each of them would refund to said parties to be defrauded the amount of the fee already so paid to said defendants"; whereas, as defendants and each of them knew, defendants could not locate said parties and could not secure for them the preference right to purchase the land mentioned for $2.50 per acre by filing said application; "and the agreement, as to the land, to be performed in consideration of the payment of said fee was for the purpose of securing the payment of said initial fee and for the purpose of delaying the said parties to be defrauded from demanding the repayment of said initial fee and for the purpose of preventing said

parties to be defrauded from discovering the fact that they had been defrauded and disclosing said fact to others, and said defendants and each of them intended to appropriate to their own use and the use of each of said defendants said initial fee, and did not intend to refund said initial fee or any part thereof if said parties to be defrauded failed to get title to said land in accordance with said agreement." Then follows an averment that defendants made use of the mails for the purpose of executing the scheme by causing a letter inclosing a timber and stone application to be sent by mail to the Register of the Land Office.

At first the demurrer was overruled by the District Court, but at the same time it was ordered that the Government should furnish a bill of particulars "stating the reason why the land in question could not be secured by the applicants." A bill of particulars was filed setting up, in brief, that the lands could not be secured under the Timber and Stone Act (a) because they were covered by a list of selections made by the State of Washington in lieu of school sections 16 and 36; and (b) because the statements to be made in the application as to the character of the land were to be made on information and belief, and not from the applicant's personal knowledge after examination of the land as required by the rules of the General Land Office. The defendants moved to strike out the bill of particulars, and this was treated by the District Court as a petition for a rehearing of the demurrer to the indictment as amplified by the bill of particulars; and thereupon the demurrer was sustained.

Notwithstanding a contention to the contrary, it seems to us that the decision was based upon a construction of § 215 of the Criminal Code, and hence that we have jurisdiction under the Criminal Appeals Act. *United States* v. *Patten*, 226 U. S. 525, 535; *United States* v. *Nixon*, 235 U. S. 231, 235.

In reviewing the judgment we shall disregard the bill of particulars, since this forms no part of the record for the purposes of the demurrer. *Dunlop* v. *United States*, 165 U. S. 486, 491.

In brief, the indictment avers that the scheme of defendants was to induce their intended victims to part with their money by representing to them that certain land (not described except generally as being located in the Western District of Washington) could be purchased from the United States under the Timber and Stone Act for less than its real value if the victims would employ defendants to secure such land and would pay a part of the proposed fee in advance; the defendants agreeing at the same time that in case of non-success the money thus prepaid would be refunded; whereas in truth, as defendants well knew, for some reason not specified they could not carry out the agreement, and the purpose of making it was to secure the payment of the initial fee by the intended victims, which defendants intended to appropriate to their own use and did not intend to refund in case of a failure to secure title in accordance with the agreement.

In our opinion such a scheme is a "scheme or artifice to defraud . . . by means of false or fraudulent pretenses, representations, or promises" within the meaning of § 215 of the Criminal Code. To use the mails in order to carry out a scheme for getting money by the making of promises or agreements which, whether known to be impossible of performance or not, there is no intention to perform, is a forbidden use of the facilities of the post office department. *Durland* v. *United States*, 161 U. S. 306, 313. The District Court erred in holding otherwise, and its judgment is

Reversed.

UNITED STATES *v.* COMYNS ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

No. 235. Argued November 4, 5, 1918.—Decided January 7, 1919.

A bill of particulars supplementing an indictment is no part of the record for the purpose of deciding a demurrer.

An indictment alleged a scheme to defraud divers persons, through use of the mails, by representing that certain land could be purchased by them under the Timber & Stone Act for less than its value, and that defendants would secure it for them in return for fees part payable in advance, and would refund such advance payments in case of non-success, whereas the defendants well knew they could not carry out the agreement, but intended to secure the advance payments and to appropriate them to their own use.

Held: (1) That a decision sustaining a demurrer was based upon a con-